(21,100.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 697.

THE SOUTHWESTERN OIL COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

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1 *Caption.*

THE STATE OF TEXAS, *County of Travis:*

At a term of the District Court of the 26th Judicial District of Texas, begun and holden at Austin, within and for the County of Travis, before the Hon. V. L. Brooks, and ending on the 16th day of December, A. D. 1905, the following case came on for trial, to-wit:

No. 23324.

THE STATE OF TEXAS
vs.
THE SOUTHWESTERN OIL COMPANY.

Plaintiff's First Amended Original Petition.

Filed November 27, 1905.

2 In District Court of 26th Judicial District of Texas, October Term, 1905.

THE STATE OF TEXAS
vs.
THE SOUTHWESTERN OIL CO.

To the Honorable Judge of said Court:

Your petitioner, the State of Texas, hereinafter styled plaintiff, appearing herein by her Attorney General, with leave of the Court first had and obtained, files this her first amended original petition in lieu of the original petition hereinbefore filed on the 27th day of October, 1905, and amending, says:

The Southwestern Oil Co., hereinafter styled defendant, is a corporation duly incorporated under the laws of the State of Texas, and, as such corporation, is doing business in said State of Texas in the capacities herein stated; that Adolph H. Stille is President of said corporation, and resides in Jefferson County, Texas.

Plaintiff alleges that the 29th Legislature of the State of Texas passed an Act, known as the Kennedy Bill which was approved by the Governor of said State on the 17th day of April, 1905, and became a law, of said State on said 17th day of April, 1905, said Act being Chapter 148, Acts of the 29th Legislature, page 358.

That said Act levies an occupation tax upon certain individuals, firms, joint stock associations, and corporations engaged in the several occupations named and enumerated therein:

And section 9 of said Act levies and imposes an occupatio tax upon each and every person, association of persons, or corporation created by the laws of this State, or any other State or nations, engaging in their own name, or in the name of others or in the name of

their representatives or agents in this State, in the wholesale business of coal-oil, naptha, benzine, or any other mineral oils refined from petroleum, and any and all mineral oils; said annual occu-
3 pation tax so levied, and the amount thereof to be ascertained and determined as follows:

Two per cent. upon the gross receipts from any and all sales in this State of any and all of the aforesaid articles;

And two per cent. of the cash market value of any and all of said articles that may be received, possessed, or handled, or disposed of in any manner other than by sale in this State;

Plaintiff alleges that said Section requires that every person, agent, association of persons, or corporation, owning, control-ing or managing such business as aforesaid, shall, on or before the 1st day of April of each year, and quarterly thereafter, report to the Comptroller under oath of the President, Treasurer, Superintendent, or other officer, the amount received by them from such business aforenamed in this State, including in said report the amount of any and all of said articles received, or possessed, or handled, or disposed of in any manner other than by sale in this State, and the cash market value thereof; and that on said report said occupation tax shall be paid to the State Treasurer quarterly;

Plaintiff alleges that the defendant, on the 1st day of January, 1905, and continuously since, was, has been and is now, engaged in this State in the wholesale business of coal oil, naptha, benzine, and all other mineral oils refined from petroleum; and on the 1st day of January, 1905, and continually since, was, has been, and is now, engaged in said State in the wholesale business of any and all mineral oils, including crude petroleum oil;

And under the provisions of said Act, and of Section 9 of said Act, said defendant is liable to plaintiff for the occupation tax prescribed and imposed thereunder;

4 That under the provisions of said Act, and of Section 9 thereof, defendant is required to make a report of its wholesale business, as aforesaid, for the quarter ending July 1st, 1905, and for each quarter continuously thereafter;

That said defendant filed with the Comptroller of Public Accounts of this State the report required under said Act aforesaid, and under Section 9 thereof, for the quarter ending July 1st, 1905, but declined and refused to pay said tax imposed, claiming that it was not liable therefor;

Said report so filed, as aforesaid, is as follows, towit:

Statement of the transactions of the Southwestern Oil Company between the 17th day of April, 1905, and the 1st day of July, 1905, as to which, the question may exist as to whether or not the Kennedy Tax Law applies.

I.

The Southwestern Oil Company between said dates sold its refined oils and refined products of crude oil manufactured by itself in Texas, it being a refining company, for which it received $19,902.67.

II.

During the same period the Sotuhwestern Oil Company sold refined oils and other products refined from petroleum oil, not manufactured by itself, but purchased for the purpose of selling, to the amount of $8,654.88.

III.

During the same period said company sold in Texas of crude oil which it had bought in Texas, and received from said sales, $175.39.

5 IV.

During the same period and at the end thereof said Southwestern Oil Co. had on hand refined oils and other products refined from petroleum manufactured by itself in Texas, but not sold, *o*t otherwise disposed of, of the value of $37,798.82.

V.

During the same period and at the end thereof said Southwestern Oil Co. had in its possession refined oils and other products refined from petroleum which were purchased by it and not manufactured by it, and not sold at the end of said period, of the value of $1,548.31.

VI.

During the same period and at the end thereof the Southwestern Oil Co. had on hand crude oil purchased for the purpose of refining, but not as yet refined, or otherwise disposed of during said period, of the value of $3,847.21.

VII.

During the said period the Southwestern Oil Co. purchased 166 6/10 barrels of semi-crude oil in Louisiana and shipped the same into this State for the purpose of refining the same, which either was refined during said period, or held by it for said purpose, of the value of $149.94.

As to the oil referred to in paragraph 1, hereof, $11,941.60 worth thereof was sold to intermediate persons who sold again for profit, the sales to such middlemen being in quantities ranging from 5 to 200 gallons each; and the balance of said oil referred to in paragraph 1, to-wit, $7,961.06 worth thereof, was sold to consumers direct, the sales ranging from 1 to 10 gallons each.

As to the oil referred to in paragraph II hereof, the amount of $5,192.89 worth thereof was sold to intermediate or middlemen who sold again for profit, the sales ranging in quantities from 5 to 200 gallons each; and as to the balance of said oil referred to in
6 paragraph II, to-wit, $3,461.94 worth thereof, the same was sold direct to consumers in quantities ranging from one to ten gallons.

Plaintiff avers by reason of the premises, the defendant as being engaged in the wholesale business of oils refined from petroleum, is

liable to said plaintiff, as an occupation tax for the quarter ending July 1st, 1905, as imposed under Section 9 of said Act, the several specific amounts hereinafter named as follows:—

From paragraph 1 of said report it appears, and plaintiff alleges the fact to be, that defendant, during the time between the 17th day of April, 1905, and the 1st day of July, 1905, received from the sale of refined oils and refined products of crude oil, manufactured by defendant and sold by it, in said State, the sum of $19,902.67; and that said defendant, during said period received, possessed, handled and disposed of said refined oil and is therefore liable to said plaintiff in the sum of two per cent. of said amount being $398.00, as an item of the occupation tax imposed under the provisions of Section 9 of said Act.

That from paragraph 2 of said report, it appears, and plaintiff alleges the fact to be, that the defendant, during the period between the 17th day of April, 1905, and the 1st day of July, 1905, received from the sale of refined oil, and other products refined from petroleum, which refined oil had been purchased by the defendant and sold by the defendant in this State, the sum of $8,654.88; and that said defendant, during said period, received, possessed, handled and disposed of said refined oil as shown by said report, and
7 is, therefore, liable to the said State of Texas in the sum of two per cent. upon said amount, being $173.09, as an item composing the occupation tax due under the provisions of Section 9 of said Act.

That from paragraph 4 of said report it appears, and plaintiff alleges the fact to be, that the defendant, between the 17th day of April, 1905, and the 1st day of July, 1905, received, possessed, and handled, but did not dispose of refined oils refined from petroleum by the defendant, of the cash market value of $37,798.82, as shown by said report, and is, therefore, liable to said plaintiff in the sum of two per cent. upon said cash market value, being $755.64, as an item composing the occupation tax due under the provisions of Section 9 of said Act.

That from paragraph 5 of said report it appears, and plaintiff alleges the fact to be, that defendant, between the 17th day of April, 1905, and the 1st day of July, 1905, received, possessed, and handled, but did not dispose of refined oils which had been purchased by the defendant, of the cash market value of $1,548.31, as shown by said report, and is, therefore, liable to said plaintiff in the sum of two per cent. upon said amount, being $30.95, as an item composing the occupation tax due under the provisions of Section 9 of said Act.

Plaintiff avers that the defendant, as being engaged in the wholesale business of crude petroleum oils and other crude mineral oils, is liable to said plaintiff, as an occupation tax for the quarter ending July 1st, 1905, said tax being imposed under Section 9 of said Act, said occupation tax being composed of the several items hereinafter specified, to-wit:

That from paragraph 4 of the aforesaid report, it appears, and plaintiff alleges the fact to be, that the defendant, during the pe-

riod between the 17th day of April, 1905, and the 1st day
8 of July, 1905, received from the sales of crude oil bought by the defendant in this State, and sold by it in this State, the sum of $175.39; and said defendant received, possessed, handled, and disposed of said oil during said period, as shown by said report, and is, therefore, liable to said plaintiff in the sum of two per cent. upon said amount, being $35.07, as an item composing the occupation tax imposed under Section 9 of said Act;

That from paragraph 6 of said report, it appears, and plaintiff alleges the fact to be, that the defendant, during the time between the 17th day of April, 1905, and the 1st day of July, 1905, received, possessed, and handled, but did not dispose of crude oil, of the market value of $3,847.21, and is, therefore, liable to said plaintiff in the sum of two per cent. of said amount, that is $76.94, as an item composing the occupation tax due under the provisions of Section 9 of said Act.

That from paragraph 7 of said report, it appears, and plaintiff alleges the fact to be, that the defendant, during the time between the 17th day of April, 1905, and the 1st day of July, 1905, received, possessed, and handled, but did not dispose of semi-crude oil of the market value of $149.94, as shown by said report, and is, therefore, liable to said plaintiff in the sum of two per cent. upon said amount, being $2.99, as an item composing the occupation tax imposed under the provisions of Section 9 of said Act.

Wherefore, premises considered, plaintiff prays that the defendant be cited to answer this petition, and upon final hearing hereof that she have judgment against defendant for the following
9 specific amounts, being the items composing the occupation tax imposed upon plaintiff under the provisions of Section 9 of said Act, viz:

The sum of	$398.05
And the sum of	173.09
And the sum of	755.64
And the sum of	30.95
And the sum of	35.07
And the sum of	76.94
And the sum of	2.99

Plaintiff prays that she recover of defendant all costs in this behalf incurred, and that she have such other and further relief as she may be entitled to, either in law or equity.

R. V. DAVIDSON,
Attorney General,
CLAUDE POLLARD,
Assistant Attorney General,
For Plaintiff.

(Endorsed:) No. 23,324. The State of Texas *vs.* The Southwestern Oil Co. Plaintiff's 1st Amended Original Petition. Filed Nov. 27, 1905. Jas. P. Hart, Clerk.

10 *Defendant's Original Answer.*

Filed November 27, 1905.

In the District Court of Travis County for 26th Judicial District of Texas, October Term, A. D. 1905.

No. —.

THE STATE OF TEXAS
vs.
SOUTHWESTERN OIL CO.

Now in the above styled and numbered cause comes the Defendant, the Southwestern Oil Company by its attorneys, and

First.

This defendant excepts to the original petition of the plaintiff, the State of Texas, and says that the same is wholly insufficient in law, and presents no cause of action against this defendant.

Second.

And this defendant further excepts to each separate demand made against it by plaintiff in said petition, and says that as respects each said separate demand, the allegations of said petition are wholly insufficient to permit plaintiff to maintain this suit, and that same presents no cause of action against this defendant.

Third.

This defendant further excepts to each and every moneyed demand made by plaintiff in its petition against this defendant, and for ground of this exception says it is apparent from said petition that the sole alleged warrant or basis for each such sum demanded of this defendant is section 9 of the purported law, styled the
11 Kennedy Bill, and constituting Chapter No. 148 of the Acts of the 29th Legislature of Texas, and that said Section of said law is wholly invalid for this:

(1) That it is an attempt to levy a tax upon the articles and property therein mentioned, and not upon all other articles and property which are taxable under the Constitution of Texas, and is, therefore, in contravention of section 1 of article 8 of said Constitution, in that such attempted taxation in said section 9 is not equal and is not uniform.

(2) That further said attempt to so tax said articles and property mentioned in said section 9 is in contravention of section 9 of articles 8 of said Constitution in that it attempts to levy a higher rate of taxation than is authorized.

(3) That if said section be held to be an attempt to impose an occupation tax, yet the same is void because it is in contravention of

the 14th amendment to the Constitution of the United States in that it denies the equal protection of the law.

(4) That if said section be held to be an attempt to impose an occupation tax, yet same is void because it is in contravention of Section 2 of article 8 of the Constitution of Texas.

(5) That if said section 9 be construed not to be a property tax, but an occupation tax, yet defendant says that the same is wholly invalid as such occupation tax because said section 9 is vague and uncertain, and fails to sufficiently designate or describe the occupation, calling or pursuit sought to be taxed thereby.

Fourth.

This defendant further excepts to each and every moneyed demand made by plaintiff in its petition against this defendant, and for ground of said exception says it is apparent from said petition that the sole claimed warrant or basis for each such sum demanded of this defendant is section 9 of the purported law, styled the Kennedy Bill, and constituting Chapter 148 of the Acts of the 29th Legislature of Texas, and that said section of said law constitutes no legal warrant for the collection of any of the sums demanded of this defendant, particularly because if said section 9 be held to validly impose an occupation tax, still it constitutes no basis for any of the demands here made against this defendant for that it appears from the petition that the transactions on account of which such demands are made that this defendant should pay taxes, were had prior to July 1, 1905, and consequently at a time when said law was not in force.

12

And this defendant further specially excepts to the particular demands made by plaintiff as follows:—

Fifth.

To the demand for $398.08, alleged tax of two per cent. upon $19,902.67, receipts from sales as shown in paragraph I of the exhibit to the petition of plaintiff, this defendant further excepts:

(1) In that it appears from said petition and its exhibit that these refined oils and refined products of crude oil were manufactured by defendant, and were not bought by defendant as a wholesale dealer, or for resale, and that consequently such sales of said manufactured oils and refined products are not within the scope or purview of said law; and

(2) That it further appears from said petition and its exhibits that of said aggregate sales of $19,902.67 the amount of $7,961.06 thereof represented receipts from sales made directly to the consumers of such products, and parcelled out in quantities too small to be considered as wholesale, and not made to other persons for resale, or in wholesale quantities, and it consequently appears that this defendant was not, as respects that part of the said sales, a wholesale dealer, and hence is not taxable on such receipts under said law.

13

Sixth.

To the demand for $173.09 alleged tax of two per cent. upon $8,654.88 receipts from sales as shown in paragraph II of the exhibit to plaintiff's petition, this defendant further excepts for that it appears from said petition and its exhibit that of said aggregate sales $3,461.94 thereof represented sales made direct to the consumer, and was parcelled out in quantities too small to be considered as wholesale, and not to middlemen for resale, or in wholesale quantities, and that consequently this defendant was not as respects said portion of said sales a wholesale dealer, and hence is not taxable thereon under said law.

Seventh.

To the demand for $35.07, alleged tax of two per cent. upon $175.39, receipts from sale of crude oil as shown in paragraph III of the exhibit to the petition of plaintiff, this defendant further excepts for that it appears from said petition that these receipts were from the sale of crude oil, and not from sales of refined oils or of other products refined from petroleum or other minerals, and it therefore is manifest that defendant is not liable to the tax demanded of it, because under said section 9 of said law, if valid, only the wholesale dealer in the oils and products refined from petroleum and other minerals are taxable, and no tax is imposed upon the wholesale dealer in crude petroleum.

14 Eighth.

To the demand for $755.64, alleged tax of two per cent. on $37,798.82, cash market value of oils and other products refined by defendant from petroleum and not sold or disposed of, but received, possessed and handled by defendant as shown by paragraph IV of the exhibit to the petition, this defendant further excepts for this:

(1) The attempt under said section 9 to tax the cash market value of any and all articles mentioned in said section 9 that may be received, possesses or handled or disposed of otherwise than by sale, is manifestly ineffectual for that it is an attempt to impose thereon a direct property tax which is not equal and uniform with that imposed upon other property subject to taxation, and which tax is imposed for state purposes, and is in excess of the amount permitted by the Constitution of Texas; and,

(2) That said section 9, if valid at all, does not permit the collection of any taxes except upon the gross receipts from sales of a dealer, and the attempt by said section 9 to tax any person, even though a dealer, upon the value of the products received, handled or possessed by him is wholly invalid as beyond the scope of its caption or title which permits taxation only upon the business of wholesale dealing, that is purchasing and selling or products refined from petroleum.

(3) That it appears that such oils and other products refined from petroleum of the value stated, and whose receipts, possession and handling by defendant is sought to be made the basis of said tax demanded, were the products of manufacture by defendant, and were

not purchased by defendant for resale, and it is therefore
15 manifest that defendant cannot be required to pay this tax so demanded since said section 9 of said law, if valid, imposes a tax only upon the wholesale dealer who buys and sells oil and other products refined from crude petroleum, and does not tax the manufacturer who refines such oils and products.

(4) That it is apparent from said section 9 of said law that it was not intended to tax the mere receipt, possession or handling even by a dealer of products refined from petroleum, but only to tax such dealer when he delivers to another such products refined from petroleum, and to provide that such receipt, possession or handling by another shall be the evidence upon which the dealer should be held liable for said tax, and since it appears that the particular oils and other refined products on account of whose receipt, possession or handling this specific tax is sought to be collected, have never passed from the possession of this defendant, it consequently appears that this defendant is not liable therefor.

Ninth.

To the demand for $30.95, alleged tax of two per cent. upon the cash market value of the oil and other products refined from petroleum not sold or disposed of by defendant but received, possessed and handled by it, as shown in paragraph V of the exhibit to the petition, this defendant further excepts for this:—

(1) The attempt under said section 9 to tax the cash market value of any and all articles mentioned in said section that may be received, possessed or handled or disposed of otherwise than by sale is manifestly ineffectual, since it is an attempt to impose thereon a direct property tax which is not equal and uniform with that im-
16 posed upon other property subject to taxation, and which tax though imposed for state purposes is in excess of the amount permitted to be levied under the Constitution.

(2) This Section 9, if valid at all, does not permit the collection of any taxes except upon the gross receipts from sales of a dealer, and the attempt by said section 9 to tax any person, even though a dealer, upon the value of the products received, handled or possessed is wholly invalid as beyond the scope of the caption of said law, which permits taxation only upon the business of wholesale dealing, that is, purchasing and selling of products refined from petroleum.

(3) That it is apparent from said section 9 of said law that it was not intended to tax the mere receipt, possession or handling even by a dealer of products refined from petroleum, but only to tax such dealer when he delivers to another such products refined from petroleum, and to provide that such receipt, possession or handling by another shall be the evidence upon which the dealer shall be held liable for said tax, and since it appears that the particular oils and other refined products on account of whose receipt, possession or handling this specific tax is sought to be collected, have never passed from the possession of this defendant, it consequently appears that this defendant is not liable therefor.

Tenth.

To the demand for $76.94, alleged tax of two per cent. upon $3,847.21, the cash market value of crude oil bought for refining, but not refined, and yet received, possessed and handled as shown by paragraph VI of the exhibit to the petition, this defendant further excepts for this:—

(1) The attempt under said section 9 to tax the cash
17 market value of any and all articles mentioned in said section that may be received, possessed or handles, or disposed of otherwise than by sale is manifestly invalid, since it is an attempt to impose thereon a direct property tax which is not equal and uniform with that imposed upon other property subject to taxation, and is further invalid in that it is an attempt to impose a tax upon property for state purposes and in excess of the amount permitted by the Constitution; and,

(2) This Section 9, if valid at all, does not permit the collection of any taxes except upon the gross receipts from sales of a dealer, and the attempt by said section 9 to tax any person upon the value of the product received, handled or possessed by him is wholly invalid as beyond the scope of the caption of said law; and,

(3) That it further appears from said petition that the said crude oil, the receipt, possession and handling of which is sought to be made the basis of this tax demand, was not bought for resale by the defendant as a dealer, but was purchased by it as a manufacturer, and for the purpose of refining the same, and hence such transactions are not taxable.

(4) That it is apparent from said section 9 of said law that it was not intended to tax the mere receipt, possession or handling even by a dealer of products refined from petroleum, but only to tax such dealer when he delivers to another such products refined from petroleum, and to provide that such receipt, possession or handling by another shall be the evidence upon which the dealer should be held liable for said tax, and since it appears that the particular oils and other refined products on account of whose receipt, possession or handling this specific tax is sought to be collected, have never
18 passed from the possession of this defendant, it consequently appears that this defendant is not liable therefor.

(5) That it further appears from said petition that it seeks to make the receipt, possession and handling of crude oil the basis of this tax demand, and that it is manifest from said law that the same does not apply nor impose a tax upon the receipt, possession or handling of crude oil, but only applies to a dealer in the products refined from petroleum and other oils.

Eleventh.

To the demand for $2.99, alleged tax of two per cent. upon $149.94, cash market value of semi-crude oil purchased in Louisiana, and shipped to Texas for the purpose of refining, and either refined or held for that purpose, and being received, possessed and handled by defendant as shown in paragraph VII of the exhibit to the petition, this defendant excepts for this;

(1) The attempt, under said section 9, to tax the cash market value of any and all articles mentioned in said section that may be received, possessed or handled or disposed of otherwise than by sale is manifestly ineffectual, since it is an attempt to impose thereon a direct property tax which is not equal and uniform, with that imposed upon other property subject to taxation, and which tax is attempted to be imposed for state purposes, and is in excess of the amount permitted by the Constitution; and,

(2) This said section 9, if valid at all, does not permit the collection of any taxes except upon the gross receipts from sales of the dealer, and the attempt by said section 9 to tax any person, even though a dealer upon the value of the products handled or possessed is wholly invalid as beyond the scope of the law.

19 (3) That it appears that these same crude oils, on account of whose receipt, possession or handling this tax is demanded, were not acquired by defendant as a dealer for the purpose of resale, but were acquired by it as a manufacture- for refining purposes, and it consequently appears that such transactions are not taxable under said section 9, which, if valid at all, imposes a tax only upon the wholesale dealer in refined oil and other products refined from petroleum, and not upon the manufacturer or refiner of such oil or products.

(4) That it is apparent from said section 9 of said law that it was not intended to tax the mere receipt, possession or handling even by a dealer of products refined from petroleum, but only to tax such dealer when he delivers to another such products refined from petroleum, and to provide that such receipt, possession or handling by another shall be evidence upon which the dealer should be held liable for said tax, and since it appears that the particular oils and other refined products on account of whose receipt, possession or handling this specific tax is sought to be collected, have never passed from the possession of this defendant, it consequently appears that this defendant is not liable therefor.

And of these demurrer, general and special, defendant respectfully prays judgment of the Court.

And if required to answer herein, this defendant denies all and singular the allegations of plaintiff's petition, and of this it puts itself upon the country.

GREER, MINOR & MILLER,
GREER, NALLE & NEBLITT,
JAS. L. AUTRY,
CARLETON & PROCTOR,
Attorneys for Defendant, Southwestern Oil Company.

(Endorsed:) No. 23324. The State of Texas *vs.* Southwestern Oil Company. Filed Nov. 27, 1905. Jas. P. Hart, Clerk. Answer of the Defendant.

20 *Judgment.*

December 14, 1905.

23324.

THE STATE OF TEXAS
vs.
THE SOUTHWESTERN OIL COMPANY.

This case having been submitted and argued to the Court at a preceding day of this term, on the First Amended Original Petition of the Plaintiff, filed November 27, 1905, and the Amended Answer of the Defendant, filed on same day, both parties having announced ready for trial, no jury having been called for by either party; the demurrers and exceptions, general and special, of the defendant to the said plaintiff's amended petition were presented to the Court, and at the same time it being stated in open Court by defendant's counsel, that all of the facts alleged in the plaintiff's petition, including the report therein, were true and correctly stated all dealing and transactions of the defendant from the 27th day of April, 1905, until the 1st day of July, 1905, with respect to which the plaintiff claimed judgment for taxes. The Court reserved its ruling on all of said demurrers and exceptions, until a final decision of the case. And the Court having considered the pleadings of defendants, and said agreement as to the facts, and having heard the argument of
21 counsel, it is of the opinion that the law is with the plaintiff, as hereinafter indicated, and with the defendant on certain points, as hereinafter indicated, and on the whole case the demurrer and exceptions as well as the agreed Statement of Facts, the Court doth decree as follows:—

I.

That as to sale of refined oil, or refined products by the defendant stated in paragraph 1 of said report incorporated in said Amended Petition, amounting to $19,902.67, that plaintiff is entitled to recover 2% on $11,941.60 thereof, amounting to the sum of $238.83. That as to the remainder of said sum of $19,902.67, to-wit: $7,961.06, the plaintiff is not entitled to recover any taxes thereon, the same not being a wholesale dealing in such refined products, and therefore, not taxable.

II.

That as to the proceeds of the sales of refined oil set forth in paragraph II of the report incorporated in plaintiff's amended petition, that plaintiff is entitled to recover 2% on $5,192.89 thereof, amounting to the sum of $103.85, but is not entitled to recover anything on the remainder of the $8,654.88 to-wit: the sum of $3,461.94 the same having been sold to consumers, and not as a wholesale dealer.

III.

That as to the proceeds of the oil mentioned in paragraph III of the report incorporated in plaintiff's amended petition, the plaintiff is not entitled to recover anything by reason of such sales.

IV.

That as to the transaction mentioned in paragraph IV of the report incorporated in plaintiff's first Amended Petition, to-
22 wit: Having on hand at the end of the period from April 17th to July 1, 1905, refined oils and other products refined from petroleum by the defendant, but not sold or otherwise disposed of, that the plaintiff is entitled to recover 2% of the value thereof, to-wit: 2% on $37,798.82, or $755.95.

V.

That as to the transaction set forth in paragraph V of the report incorporated in plaintiff's First Amended Original Petition, to-wit: Having on hand refined oils and other products refined from petroleum purchased by it and not manufactured by it, and unsold July 1, 1905, of the value of $1,548.31, that the plaintiff is entitled to recover 2% of said value, to-wit: the sum of $30.97.

VI.

That as to the transaction set forth in paragraph VI of the report incorporated in plaintiff's amended petition, to-wit: The having on hand of crude oil purchased for the purpose of refining, on July 1, 1905, of the value of $3,847.21, that plaintiff is not entitled to recover anything by reason thereof.

VII.

That as to the transaction set forth in paragraph VII of the report incorporated in plaintiff's amended petition, to-wit: the purchase in the State of Louisiana of 166.6 barrels of semi-crude oil to be shipped into this State for the purpose of refining, in value of $149.94, that the plaintiff is not entitled to recover anything by reason of said transaction.

It is therefore, ordered, adjudged and decreed by the Court that the plaintiff, The State of Texas, do have and recover of and from the defendant, the Southwestern Oil Company, the aggregate of the above named sums, to-wit: Eleven Hundred, Twenty Nine
23 and 61/100 Dollars ($1129.61/100) for which execution may issue.

It Is Further ordered, adjudged and decreed by the Court that as to amount stated in the above paragraph herein, where it is declared that the State is not entitled to judgment as respect thereto, that as to such claims the State take nothing by this suit, and that the defendant go hence without day.

It Is Further ordered, adjudged and decreed by the Court that the

plaintiff recover of and from the defendant, all costs of suit, for which execution may issue.

To which judgment of the court, both plaintiff and defendant, in open Court excepted and gave notice of appeal to the Honorable Court of Civil Appeals for the Third Supreme Judicial District of Texas.

Twenty days is allowed from the adjournment of the Court for making and filing Bills of exceptions, and Statement of Facts.

24 *Statement of Facts.*

Filed December 30, 1905.

No. 23324.

THE STATE OF TEXAS
vs.
SOUTHWESTERN OIL COMPANY.

Cause Tried in the District Court of the 26th Judicial District of Travis County, Texas, at the October Term, Thereof, it Being on the 14th Day of Dec., A. D. 1905.

It is hereby agreed that upon the trial of the above entitled cause the following is a substantial statement of all the facts, and of the admissions as to matters of fact by the parties to said cause upon which judgment was entered:—

(1) In open Court it was admitted and announced to the Court by both parties that all of the facts set forth in Plaintiff's pleadings, that is, in Plaintiff's First Amended Original Petition, were true, which facts are embodied in the Statement or Report, attached as an exhibit to plaintiff's pleadings, which is as follows, to-wit:—

"Statement of the transactions of the Southwestern Oil Company between the 17th day of April, 1905, and the 1st day of July, 1905, as to which, the question may exist as to whether or not the Kennedy Tax Law applies.

I.

"The Southwestern Oil Company between said dates sold its refined oils and refined products of crude oil manufactured by itself in Texas, it being a refining company, for which it received $19,902.67.

25 II.

"During the same period the Southwestern Oil Company sold refined oils and other products refined from petroleum oil, not manufactured by itself, but purchased for the purpose of selling to the amount of $8,654.88.

III.

"During the same period said company sold in Texas of crude oil which it had bought in Texas, and received from said sales $175.39.

IV.

"During the same period and at the end thereof said Southwestern Oil Co. had on hand refined oils and other products refined from petroleum manufactured by itself in Texas, but not sold, or otherwise disposed of, of the value of $37,798.82.

V.

"During the same period and at the end thereof said Southwestern Oil Co. had in its possession refined oils and other products refined from petroleum which were purchased by it and not manufactured by it, and not sold at the end of said period, of the value of $1,548.31.

VI.

"During the same period and at the end thereof the Southwestern Oil Company had on hand crude oil purchased for the purpose of refining, but not as yet refined, or otherwise disposed of during said period, of the value of $3,847.20.

VII.

"During the said period the Southwestern Oil Company purchased 166 6/10 barrels of semi-crude oil in Louisiana and shipped
26 the same into this State for the purpose of refining the same, which either was refined during said period, or held by it for said purpose, of the value of $149.94.

"As to the oil referred to in paragraph I hereof $11,941.60 worth thereof was sold to intermediate persons who sold again for profit, the sales to such middlemen being in quantities ranging from 5 to 200 gallons each; and the balance of said oil referred to in paragraph I, to-wit, $7,961.06 worth thereof, was sold to consumers direct, the sales ranging from 1 to 10 gallons, each.

"As to the oil referred to in paragraph II hereof, the amount of $5,192.89 worth thereof was sold to intermediate or middlemen who sold again for profit, and the sales ranging in quantities from 5 to 200 gallons each; and as to the balance of said oil referred to in paragraph II, to-wit, $3,461.94 worth thereof, the same was sold direct to the consumers in quantities ranging from one to ten gallons."

The plaintiff next offered in evidence what is admitted to be a printed copy of the original House Bill number 361 which was the inception of Chapter No. 148 of the Acts of 1905, being the Act in controversy, and it was admitted that said Act was introduced in the House of Representatives of the State of Texas on February 1st, 1905, being then read for the first time, and referred to the Committee on Revenue and Taxation, and thereafter on February 8th, 1905, it was reported favorably, with certain amendments, the favorable committee report being found on page 380 of the "Journal" of the House of Representatives hereto referred to and made
27 part hereof. However, the pertinent parts of the Original House Bill No. 361, and the amendments thereto as shown by the Journals are as follows:—

The original caption reads thus: "An Act to provide for the levy

and collection of a tax upon the gross receipts of certain corporations."

The caption as amended by the committee report and adopted as a part of the Committee Report (House Journal, page 387) on February 14th, 1905 (House Journal, page 400) reads as follows:—

"An Act to provide for the levy and collection of an occupation tax upon express companies, sleeping car companies, palace car companies, dining car companies, wharf companies, telegraph companies, telephone companies, surety and guaranty companies, gas companies, electric light companies, water works companies, dealers in naptha, benzine or other mineral oils refined from petroleum, text book publishers, companies owning, leasing or hiring any kind of cars to railroads, street and inter-urban car lines, oil companies, pipe line companies and persons and individuals engaged in any of said business."

The original section of House Bill 361 applicable was numbered section (9) nine, and under the house committee report, dated February 8th, 1905, which reported the bill favorably, recommending a complete substitute for the bill. Said Section nine became section eight of the substitute bill, and was not in any respect changed in the committee substitute from the original section nine except as to the number of the section, the committee substitute appearing on pages fourteen and fifteen of the printed bill reads as follows with the number of the page and lines indicated as they appear in the committee report:

Page 14.

"SEC. 8. Each and every person, association of persons or corporation created by the laws of this or of any other state or nations, which, may engage in their own name, or in the name of others, or in the names of their representatives or agents, in this State, for the sale of coal oil naptha, benzine, or other mineral oils refined from petroleum, and all mineral oils whether refined or not, shall pay an annual tax of two per cent. upon their gross receipts from such business in this State, Said tax herein provided for shall be paid to the State Treasurer quarterly, and every such person, agent, association of persons, or corporation, so owning, controlling or managing such business shall on or before the first

P. 15.

day of March and quarterly thereafter, report to the Comptroller, under

oath of the president, treasurer, superintendent, or some other officer of said corporation or association, or some duly authorized agent thereof, the amount received by them from such business in this State. should

any person, association or persons or corporation, or the officers or agents of any such corporations, person or association of persons herein named fail to make the report herein provided for and pay said taxes, for thirty days after the termination of any quarter of the year, then he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than fifty nor more than one hundred dollars Each and every day after said thirty days have expired shall be deemed a separate of offense. In addition thereto, in the event of the failure of the officers or agents of any such company or corporation to make the report and pay said taxes for thirty days after the termination of any quarter of the year, each and every such company or corporation, or their officer, or agent so failing shall forfeit and pay to the State the sum of twenty five dollars for each day said report and payment are delayed, which for, feiture and taxes shall be sued for by the Attorney General in the name of the State. For the purpose of suits and prosecutions provided for in

this article, venue and jurisdiction are hereby expressly conferred upon the courts of Travis County, and service may be had upon any officer or agent of such company or corporation in this State, and such service shall in all respects be held legal and valid. The tax herein levied shall be in addition to all other taxes levied by law."

Section eight, according to the amendment substitute, was amended in the House on March 1st, 1905 (House Journal, page 579) as follows:—

"Amend by striking out the words 'for the sale,' in line 40, page 14, and insert the words, 'in the wholesale business,' and in line 43 after the word 'State,' insert the following: 'And it is hereby expressly provided that the delivery to any person or firm of any of the articles hereinbefore mentioned in Section 8 of this Act, by any person in this State, or by any corporation formed under the laws of this State, or any foreign corporation having a permit to do business in this state, shall be considered an actual sale, and subject to the tax herein provided for, and"

The Bill was further amended in the House on March 1st, 1905, (House Journal, page 581) as follows:—

"Amend the bill as amended by striking out the words 'on or before the first day of March,' and the words 'on the first day of March,' wherever they appear in the bill or in any amendment thereto, except where it appears in Section 6, and insert in
31 lieu thereof the words, 'on the first day of April,' " Adopted.

(Signed) HOLMES.
KENNEDY."

The Bill as amended passed the House on March 13th, 1905 (House Journal page 710).

The Bill was read for the first time in the Senate, and referred to a Committee on Internal Improvements on March 14th, 1905 (Senate Journal page 448) and was reported favorably March 27th, 1905, by said committee without any committee amendments, but in the printing of the Senate Bill Section 9 of the original House Bill, or Section 8, of the substitute Bill, became Section 7 of the printed Senate Bill, and said section 7 (which is the section in question, and which afterwards became Section 9 of the law as it finally passed) was amended in the Senate on April 7th, 1905 (See Senate Journal 817) as follows:—

"Section 7 of the bill was read and amended as follows:

"Senator Harper offered the following amendment, which was adopted:

"Amend the bill, page 8, line 14, striking out the following words in line 14: 'Whether refined or not'

"Senator Griggs offered the following amendment:

"Amend by striking out all in line 16, page 8, after the word 'State,' and all in lines 17, 18, 19, 20 and 21, except the word 'and' in line 21.

"Senator Skinner offered the following as a substitute for the amendment:

"Amend by striking out all of Section 7 down to the last word in line 21, on page 8, and substituting in lieu thereof the following:

32 "SECTION 7. Each and every person, association or persons or corporation created by the laws of this or any other State or nation, which shall engage in their own name, or in the name of others, or in the name of their representatives or agents, in

this State, in the wholesale business of coal oil, naptha, benzine, or any other mineral oils refined from petroleum, and any and all mineral oils, shall pay an annual tax of two per cent. upon their gross receipts from any and all sales in this State of any of said articles in Section 7 of this Act hereinabove mentioned, and an annual tax of two per cent. of the cash market value of any and all of said articles that may be received or possessed, or handled or disposed of in any manner other than by sale in this State; and it is hereby expressly provided that delivery to or possession by any person, association of persons, or corporation in this State of any of the articles hereinabove mentioned in Section 7 of this Act, from whatever source the same may have been received, shall for the purpose of this Act be held and considered such a sale and such ownership and possession of such articles and property (where no sale in made) as will and shall subject the same to the tax herein provided for."

"The substitute, in lieu of the amendment was adopted."

The first amendment offered by Senator Harper striking out the words "whether refined or not" relates to those words occurring in Section 8 of the House substitute immediately following the words "and all mineral oils," and preceding the words "shall pay an annual tax."

The Senate finally passed Section 7 as amended on April 7, 1905, on page 817 of the Senate Journal indicated above and said section went into the free conference committee report without
33 amendment, and became section 9 of the free conference committee report and of the present law.

The caption of the Bill was amended by the free conference committee so as to read as it now reads in the Act which report was adopted by both Houses.

The plaintiff objected to the introduction of the caption and Section 9 of the original bill, and all of the amendments thereto, on the ground that the evidence was immaterial, which objection the court overruled. To which ruling of the Court the plaintiff then and there, in open Court, excepted.

Neither party in the foregoing cause requested, or called for a transcript of the record, or a stenographer's report, there being no stenographer, and it is agreed that the foregoing shall be taken as a statement of the facts in lieu of any stenogapher's report.

R. V. DAVIDSON, *Att'y Gen.*,
CLAUDE POLLARD, *Ass't Att'y Gen.*,
Attorneys for the Plaintiff,
The State of Texas, Appellee.
GREER, MINOR & MILLER,
GREER, NALLE & NEBLETT, &
CARLTON & PROCTOR,
Attorneys for the Defendant,
Southwestern Oil Company, Appellant.

Approved this 30th day of December, 1905.

V. L. BROOKS,
Judge of the District Court,
26th Judicial District of Texas.

34 (Endorsed:) No. 23324. The State of Texas, *vs.* Southwestern Oil Company. Statement of Facts. Filed Dec. 30, 1905, Jas. P. Hart, Clerk.

Assignments of Error.

Filed December 30, 1905.

In the District Court of Travis County in and for the 26th Judicial District.

No. 23324.

STATE OF TEXAS
vs.
SOUTHWESTERN OIL COMPANY.

Now comes the defendant, appellant, the Southwestern Oil Company, and assigns the following as errors committed on the trial of this cause, to-wit:—

* * * * * * *

Second Assignment of Error.

The Court erred in rendering any judgment in favor of the plaintiff whatsoever, and against the defendant, as and for taxes, because Section 9, of Chapter 148 of the Acts of 1905, the only
35 & 36 law under which such taxes are demandable or could be collected from this defendant, is unconstitutional and void as being in contravention of the 14th Amendment of the Constitution of the United —, and the Acts of Congress enacted thereunder.

Third Assignment of Error.

The Court erred in rendering any judgment for any sum against this defendant, and in favor of the plaintiff, because Chapter 148 of the Acts of 1905, the only law under which said taxes are demandable, or can be collected, is unconstitutional and void, in that so much thereof as attempts to lay a tax or embargo on interstate and foreign commerce, and the law does not afford any means whereby the tax levied on transactions which do not constitute interstate or foreign commerce, can be separated from those parts which do attempt to tax transactions not interstate or foreign commerce. That it is apparent that the Legislature would not have passed the law without the unconstitutional and void sections, and the whole law is, therefore void.

* * * * * * *

37–39 GREER, MINOR & MILLER,
GREER, NALL & NEBLETT,
CARLTON & PROCTOR,
Att'ys for Southwestern Oil Company, Appellant.

(Endorsed:) #23324. State of Texas *vs.* Southwestern Oil Co. Assignment of Errors, by the Appellant, Southwestern Oil Co. In District Court, Travis Co., 26th Dist. Filed Dec. 30, 1905, Jas. P. Hart, Clerk.

* * * * * * *

40–43 *Supersedeas Bond.*

Filed January 2, 1906.

In the District Court of Travis County in and for the 26th Judicial District of Texas.

No. 23324.

THE STATE OF TEXAS
vs.
SOUTHWESTERN OIL CO.

Whereas, in the above styled and numbered cause, pending in the District Court of Travis County, in the 26th Judicial District of Texas, and at a regular term of said Court, to-wit, on the 14th day of December, A. D. 1905, the State of Texas, as Plaintiff, recovered judgment against the Southwestern Oil Company, a corporation, as defendant, for the sum of Eleven Hundred Twenty Nine & 51/100 ($1129.51) Dollars, together with all cost of suit, a substantial copy of which judgment is as follows:—

* * * * * * *

44 From which judgment the said Southwestern Oil Company, a corporation, has taken an appeal to the Court of Civil Appeals of the Third Supreme Judicial District of Texas, at Austin, in the County of Travis, and desires, pending appeal, to suspend the execution of said judgment.

Now, therefore, we, the Southwestern Oil Company, as principal, and the other signers hereto as sureties, acknowledge ourselves firmly bound to pay to the State of Texas the sum of Twenty Eight Hundred ($2800.00) Dollars, conditioned that the said Southwestern Oil Company, Appellant, shall prosecute its appeal with effect, and in case the judgment of the Supreme Court, or the Court of Civil Appeals shall be against it, it shall perform its judgment, sentence or decree, and pay all such damages as said Court may award against the Southwestern Oil Company.

Witness our hands, this 30th day of December, A. D. 1905.

SOUTHWESTERN OIL CO.,
By ADOLPH H. STILLE,
President, Principal.
AMERICAN SURETY COMPANY
OF NEW YORK,
By J. E. MASTEAN,
Resident Vice President, Surety,
By E. P. GAILEY,
Resident Ass't Secretary, Surety.

[SEAL.]

Attest:
A. E. TARVER, *Secretary.*

45–47 I have fixed the probable amount of the costs of this suit in the Court of Civil Appeals, the Supreme Court and the Court below at $— and approved the foregoing bond this the 2nd day of January, A. D. 1906.

JAS. P. HART,
Clerk of the District Court of Travis County, Texas.

(Endorsed:) No. 23324. The State of Texas, *vs.* Southwestern Oil Company. Supersedeas Bond. Filed Jan'y 2nd, 1906. Jas. P. Hart, Clerk.

* * * * * * *

48 PROCEEDINGS IN THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT, AT AUSTIN.

Opinion.

Filed December 5th, 1906.

No. 3870.

THE SOUTHWESTERN OIL COMPANY.
vs.
THE STATE OF TEXAS.

Appeal from Travis County.

This was an action brought in the Twenty-sixth Judicial District at Austin, by the State of Texas, against the Southwestern Oil Company, a corporation, to recover certain taxes claimed to be due by the Southwestern Oil Company under section 9 of what is known as the Kennedy Tax Law, it being Chapter No. 148 of the General Laws of the 29th Legislature of the State of Texas (Chapter 148 Acts 1905). The State recovered judgment for a part of the taxes claimed, amounting in the aggregate to $1,129.51, and judgment went against the State as to certain items of taxes claimed in its petition.

There is no controversy about the facts of this case; therefore we find it unnecessary to set them out in the opinion. The question as to the constitutionality of the statute that imposes the tax has been recently decided by this Court in the case of Producers Oil Co. *et al. vs.* John W. Stephens, *et al.*

We overrule those assignments of error that complain of the judgment of the trial court as to certain items of taxes rendered against the appellant; and also overrule the assignments of errors of the appellee complaining of the action of the court in declining to render judgment for other amounts due.

We find no error in the record and the judgment is affirmed.

Affirmed.

FISHER,
Chief Justice.

Filed Dec. 5, 1906.

49 (Endorsed:) No. 3870. Southwestern Oil Company *vs.* The State of Texas. Appealed from Travis County. Opinion. Affirmed. Fisher, Chief Justice. Filed in Court of Civil Appeals, 3rd Supreme Judicial District, Austin, Texas, Dec. 5, 1906, R. H. Connerly, Clerk. With App. No. 5367. Filed in Supreme Court Feb. 15, 1907, F. T. Connerly, Clerk.

Judgment.

Rendered December 5, 1906.

No. 3870.

THE SOUTHWESTERN OIL COMPANY
vs.
THE STATE OF TEXAS.

Appeal from District Court of Travis County.

Opinion by Chief Justice FISHER:

"This cause came on to be heard on the transcript of the record and, the same being inspected, because it is the opinion of the Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed; that the Appellee, The State of Texas, do have and recover of and from the Appellant, The Southwestern Oil Company, principal and its surety, The American Surety Company of New York, the amount adjudged by the Court below and all costs in this behalf expended and this decision be certified below for observance."

50–52 *Appellant's Motion for Rehearing.*

Filed December 17, 1906.

In the Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin.

No. 3870.

SOUTHWESTERN OIL COMPANY, Appellant,
vs.
THE STATE OF TEXAS, Appellee.

To the honorable judges of said court:

Now comes the appellant, Southwestern Oil Company, by its counsel, and moves the Court to set aside the judgment of affirmance of the judgment of the Court below, filed in this Court December 5th, 1906, and to grant a rehearing and to reverse the judgment of the Court below, on the following grounds and for the following reasons, to-wit:

* * * * * * *

53 X.

This Court erred in refusing to sustain and in overruling appellant's tenth assignment of error, to the effect that the trial Court erred in rendering any judgment in favor of the plaintiff whatsoever and against the defendant, as and for taxes, because Section 9 of Chapter 148 of the Acts of 1905, the only law under which such taxes are demandable, or could be collected from this defendant, is unconstitutional and void, as being in contravention of the fourteenth amendment to the Constitution of the United States, and the acts of Congress enacted thereunder.

XI.

This Court erred in failing to sustain and in overruling the appellant's eleventh assignment of error, to the effect that the trial Court erred in rendering any judgment for any sum against
54–56 this defendant and in favor of the plaintiff, because Chapter 148 of the Acts of 1905 is unconstitutional and void, in that so much thereof as attempts to lay a tax or embargo on interstate and foreign commerce, is void, and the law does not afford any means whereby the tax levied on transactions which do not constitute interstate or foreign commerce, can be separated from those parts which do attempt to tax transactions of interstate or foreign commerce; that it is apparent that the legislature would not have passed the law without incorporating therein the unconstitutional and void sections, and the whole law is, therefore, void.

Appellant further shows that the Honorable R. V. Davidson, Attorney General, and the Honorable Claude Pollard, Chief Assistant Attorney General, are counsel for the appellee in this cause, and both of them reside in the City of Austin, Travis County, Texas.

GREER, MINOR & MILLER,
GREER & NALL,
CARLTON & PROCTOR,
Attorneys for Appellant, Southwestern Oil Company.

* * * * * * *

57 We insist on all of the assignments of error, and believe that the judgment of the Court below should have been reversed and judgment here rendered, and the state take nothing by the suit.

GREER & NALL,
GREER, MINOR & MILLER,
CARLTON & PROCTOR,
Att'ys for Appellant.

(Endorsed:) In the Court of Civil Appeals for the 3rd Supreme Judicial District of Texas, at Austin. Mo. 2633. No. 3870. Southwestern Oil Company, Appellant, *vs.* The State of Texas, Appellee. Appellant's Motion for Rehearing. Overruled. Filed in Court of Civil Appeals, 3rd Supreme Judicial District, Austin, Texas, Dec. 17, 1906. R. H. Connerly, Clerk. With App. 5367. Filed in Supreme Court, Feb. 15, 1907. F. T. Connerly, Clerk.

Order Made January 16th, 1907, Overruling Motion for a Rehearing.

Mo. 2633; Cause No. 3870.

SOUTHWESTERN OIL COMPANY
vs.
THE STATE OF TEXAS.

Appealed from Travis County.

Motion for a re-hearing; the motion is overruled.

58–95 PROCEEDINGS IN THE SUPREME COURT OF TEXAS.

Petition for Writ of Error.

Filed Feb. 13, 1907.

In the Supreme Court of the State of Texas.

SOUTHWESTERN OIL COMPANY, Petitioner in Error,
vs.
THE STATE OF TEXAS, Defendant in Error.

Petition for Writ of Error to the Court of Civil Appeals for the Third Supreme Judicial District.

To the Supreme Court of Texas:

Your petitioner, Southwestern Oil Company, a corporation organized under the laws of the State of Texas, and having its domicile at Houston in Harris County, Texas, complaining of the only party adversely interested, to-wit, the State of Texas, applies in this cause to this Honorable Court for a writ of error to the Court of Civil Appeals for the Third Supreme Judicial District at Austin, Texas, and represents unto your Honors:

That the Honorable R. V. Davidson, Attorney General of the State, residing at Austin, in Travis County, Texas, is the attorney of record for the Defendant in Error, the State of Texas, upon whom service of process may be made.

* * * * * * *

96 *Fourth Assignment of Error.*

This court erred in refusing to sustain and in overruling appellant's tenth assignment of error to the effect that the trial court erred in rendering any judgment in favor of the plaintiff whatsoever and against the defendant, as and for taxes, because Section 9 of Chapter 148 of the Acts of 1905, the only law under which such taxes are demandable, or could be collected from this defendant is uncon-

stitutional and void, as being — contravention of the Fourteenth Amendment to the Constitution of the United States, and the acts of congress enacted thereunder.

Proposition.

This act singles out wholesale dealers in oil and certain products refined from petroleum from among all other wholesale dealers in other articles, as sugar, bacons, coal and iron, and imposes a tax many fold greater than on any other class of wholesale dealers, and also unusual penalties and forfeitures without any reasonable grounds for such distinction. Such classification is capricious and arbitrary, in that it does not apply to persons engaged in like business, as dealers in coal, etc., and therefore denies the wholesale dealers in oil, etc. the equal protection of the law.

Authorities.

Pullman Palace Car Co. *vs.* State, 64 Texas, 274.
Hoefling & Son *vs.* City of San Antonio, 85 Texas, 228.
97 State *vs.* Compress Vo., 95 Texas 611.
Cotting *vs.* Kansas City Stock Yards Co., 183 U. S. 79.
G. C. & S. F. Ry. Co. *vs.* Ellis, 165 U. S. 150.
Fraser *vs.* McConway & Forley Co., 82 F. R. 257.

Argument.

The proper rule is laid down in Railway *vs.* Ellis, *supra:* "The mere fact of classification is not sufficient to relieve a statute of the reach of the equality clause of the Fourteenth Amendment, and in all cases it must appear not merely that a classification has been made, but also that it is based upon reasonable ground—something which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection."

If it be conceded that there is reason for distinguishing between dealers in bacon and sugar, on the one hand, and dealers in refined oils, on the other hand, still it cannot be perceived what reasonable ground for the distinction exists between the dealers in oil, used for fuel and light, and dealers in coal used for the same purposes, they being competing articles. Dealers in coal go scot free, while dealers in oil are called upon to pay the unheard of tax of two per cent. on the value of the thing—on the value of the corpus; not merely two per cent. on earnings or charges, as on the receipts from operating a railroad. It is quite a different thing, by the way, to charge two per cent. upon the earnings of a mule, from charging two per cent. on the value of the mule himself.

A case in point in Fraser *vs.* McConway & Torley Co., 82 F. R. 260, in which the following facts were involved:

A Pennsylvania law of June 5, 1897, imposed on every employer of foreign-born, unnaturalized male persons over 21 years of age

98–107 a tax of three cents per day for each day that each of such persons may be employed, and authorized a deduction of that sum from the wages of such employés. Held—That the law deprived the employés of the equal protection of the law, in violation of the Fourteenth Amendment.

This case says at page 260: "It is idle to suggest that the case in hand is one of proper legislative classification. A valid classification for the purposes of taxation must have a just and reasonable basis, which is lacking here." This case cites with approval Railroad Co. *vs.* Ellis, 165 U. S., *supra,* and the language of that case quoted above.

Oil dealers are denied the equal protection of the law, no less in the matter of the penalties and forfeitures imposed for failure to pay the tax, and make the reports, than in the tax itself.

The discriminations in this particular are fully explained and set out in our argument under the second proposition of next preceding assignment of error, reference to which is here made.

It occurs to us that these discriminatory penalties and forfeitures put this case in the same category of the Railroad Co. *vs.* Ellis, 165 U. S. 150, where it was held to be a violation of the Fourteenth Amendment, being a statute to subject railroad companies to the payment of an attorney's fee for failure to pay certain claims against the railroad, if afterward established by suit; other litigants not being subjected to the payment of such fees.

* * * * * * *

108 Your petitioner prays for a writ of error in accordance with the statutes in such cases made and provided, and for due service upon the respondent, through its attorneys, whose names and addresses are above given; and that, on the final hearing, it may please this Honorable Court to sustain the grounds of error here urged, reverse the judgments of the trial court and Court of Civil Appeals, and here render such judgment as the courts below should have rendered, including costs of court, that justice may be done.

And your petitioner prays for such other and further relief as may be proper in the premises.

GREER, MINOR & MILLER,
CARLTON & PROCTOR,
GREERS & NALL,
Attorneys for the Petitioners.

(Indorsed:) In the Supreme Court of the State of Texas. Application No. 5367. Southwestern Oil Company, Petitioner in Error, *vs.* The State of Texas, Defendant in Error. Petition for Writ of Error to the Court of Civil Appeals for the Third Supreme Judicial District. By Greer, Minor & Miller, Greers & Nall, and Carlton & Proctor, Attorneys for Petitioners. Filed in Court of Civil Appeals, Third Supreme Judicial District, Austin, Texas, Feb. 13, 1907. R. H. Connerly, Clerk. Filed in Supreme Court Feb. 15, 1907, F. T. Connerly, Clerk. Granted.

109 *Order Granting Application for Writ of Error.*

April 24, 1907.

App. No. 5367.

SOUTHWESTERN OIL CO.
vs.
STATE OF TEXAS.

From Travis County, Third District.

This day came on to be heard the Application of Southwestern Oil Company for a writ of error to the Court of Civil Appeals for the Third District, and the same having been duly considered, it is ordered that said Application be granted and the writ of error issue as prayed for and be set for submission on May 22, 1907.

Acceptance of Service of Citation.

In the Supreme Court.

SOUTHWESTERN OIL COMPANY
vs.
STATE OF TEXAS.

In the above entitled cause I hereby waive the issuance of citation and accept service of same and note that the case stands for submission on May 22, 1907.

R. V. DAVIDSON,
Attorney General of the State of Texas.
CLAUDE POLLARD,
Ass't Attorney General of the State of Texas.

(Endorsed:) App. No. 5367. Southwestern Oil Co. *vs.* The State of Texas. Acceptance of Service, etc. Filed in Supreme Court, April 26, 1907. F. T. Connerly, Clerk, By J. S. Myrick, Deputy.

110 *Order of Submission.*

May 22, 1907.

No. 1715.

SOUTHWESTERN OIL CO.
vs.
STATE OF TEXAS.

From Travis County, Third District.

Submitted on briefs for both parties and orally for Plaintiff in Error.

Opinion.

Filed June 26, 1907.

No. 1715.

THE SOUTHWESTERN OIL COMPANY, Plaintiff in Error,
vs.
THE STATE OF TEXAS, Defendant in Error.

From Travis County, Third District.

This writ of error is prosecuted from a judgment of the District Court affirmed by the Court of Civil Appeals for money recovered by the State, as plaintiff, against Plaintiff in Error, as Defendant, for taxes under the Act of the 29th Legislature, approved April 17, 1905, known as the "Kennedy" Bill. All of the questions raised by Plaintiff in Error, save one, have been decided against it in the opinion just delivered in the case of The Texas Company, against J. W. Stephens, *et al.* The further question arises out of the fact that the company, in its report to the Comptroller showed that it had on hand, during the periods for which the tax was to be ascertained, refined products of crude oil of stated values, which it had not sold or otherwise disposed of. The reasoning of the opinion just
111 referred to leads necessarily to the conclusion that the value of such products was properly included in arriving at the total amount upon which the tax was to be estimated. There is no difficulty in seeing that the articles thus held for sale in the wholesale business is within the language of the statute. The judgment must therefore be affirmed.

Affirmed.

F. A. WILLIAMS,
Associate Justice.

(Endorsed:) No. 1715. Southwestern Oil Company, *vs.* State of Texas. Opinion. Judgments affirmed. Filed in Supreme Court of Texas, June 26, 1907. F. T. Connerly, Clerk. Williams, Associate Justice.

Judgment.

Entered June 26, 1907.

No. 1715.

SOUTHWESTERN OIL COMPANY
vs.
THE STATE OF TEXAS.

From Travis County, Third District.

Opinion delivered by Associate Justice WILLIAMS:

This cause came on to be heard on writ of error to the Court of Civil Appeals for the Third Supreme Judicial District, and the origi-

nal transcript in said cause being before the Court, as well as the Transcript showing the proceedings had in said Court of Civil Appeals, and these having been duly considered, because it is the opinion of this court there was no error in the Judgment of the Court of Civil Appeals and District, it is therefore considered, adjudged and ordered that said judgments be affirmed; that the Defendant in
112 Error, The State of Texas, do have and recover of and from the Plaintiff in Error, The Southwestern Oil Company, and its surety, The American Surety Company of New York, the amount adjudged in the District Court, together with all costs in this behalf expended in this Court, and in the Court of Civil Appeals and this decision be certified to the District Court for observance.

Motion for Rehearing.

Filed July 10, 1907.

No. 1715.

THE SOUTHWESTERN OIL COMPANY, Plaintiff in Error,
vs.
THE STATE OF TEXAS, Defendant in Error.

To the Honorable Supreme Court of the State of Texas:

Now comes the plaintiff in error, Southwestern Oil Company, and files this its motion for a rehearing in the above numbered and entitled cause, and prays the Court, for the reasons and on the grounds hereinafter stated, to set aside the judgment of affirmance entered in this cause, on or about June 26, 1907, and to grant a new hearing, and to reverse the decision of the Honorable Court of Civil Appeals and of the District Court in said cause; and for grounds of this motion, plaintiff in error says as follows:

* * * * * * *

113 IV.

This Court erred in refusing to sustain plaintiff in error's fourth assignment of error, to the effect that the Court of Civil Appeals erred in overruling the plaintiff in error's tenth assignment of error, which was to the effect that the trial Court erred in rendering
114 any judgment in favor of the defendant in error whatsoever, for taxes under Section 9 of Chapter 148 of the Acts of 1905, because said section of said act is unconstitutional and void as being in contravention of the fourteenth amendment to the Constitution of the United States, in that said Section 9 of Chapter 148 of the Acts of 1905 deprives the plaintiff in error of the equal protection of the laws, or of the protection of equal laws.

* * * * * * *

Wherefore, plaintiff in error prays that this Honorable Court will grant a rehearing in this cause, and set aside the judgment of

affirmance herein entered, and render judgment reversing the judgment of the trial Court and the Court of Civil Appeals affirming the same, or shall render such judgment herein, reversing and reforming the judgment of said Court, as it may conclude is proper on a review of the whole case.

GREER, MONOR & MILLER,
F. C. PROCTOR,
D. EDWARD GREER,
Attorneys for Plaintiff in Error.

115 Austin, Texas, July 10, 1907.

Service of the above and foregoing motion for rehearing on behalf of the Defendant of Error, The State of Texas, is hereby accepted.

R. V. DAVIDSON,
Attorney General,
CLAUDE POLLARD,
Ass't Attorney General,
For Defendant in Error.

(Endorsed:) Mo. No. 1726. No. 1715. The Southwestern Oil Company, Plaintiff in Error, *vs.* The State of Texas, Defendant in Error. Motion for Rehearing. (Service accepted.) Filed in Supreme Court July 10, 1907, F. T. Connerly, Clerk, By J. S. Myrick, Deputy. Overruled, November 13, 1907.

Order Overruling Motion for Rehearing.

Nov. 13, 1907.

Mo. No. 1726. No. 1715.

SOUTHWESTERN OIL CO.
vs.
THE STATE OF TEXAS.

From Travis County, Third District.

This day came on to be heard the motion of Plaintiff in Error, The Southwestern Oil Company, for a rehearing, and the same having been duly considered, it is ordered that said motion be overruled; That the Plaintiff in Error, Southwestern Oil Company, and its surety, The American Surety Company of New York, pay all costs incurred on this motion.

116 *Petition for Allowance of Writ of Error.*

Filed March 12, 1908.

UNITED STATES OF AMERICA, *The State of Texas:*

THE SOUTHWESTERN OIL COMPANY, Plaintiff in Error,
versus
THE STATE OF TEXAS, Defendant in Error.

The petition of The Southwestern Oil Company, a corporation duly incorporated under the Laws of the State of Texas, defendant in the above entitled and numbered cause in the Court below, and plaintiff in error in this Court, respectfully shows that on the 26th day of June, 1907, the Supreme Court of the State of Texas rendered a final judgment against your petitioner in a certain cause, wherein the State of Texas was defendant in error, and your petitioner was plaintiff in error for the sum of $1129.61 and for cost, and awarded execution thereon as will appear by reference to the record and proceedings in said cause and on Nov. 13th, 1907, denied plaintiff in error a rehearing and that said court is the highest court of said State in which a decision in said suit could be had.

And your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error under Section 709 of the Revised Statutes of the United States, because your petitioner claimed before the Supreme Court of the State of Texas, and the Court of Civil Appeals of said state, and in the trial court of said State, to-wit, the District Court, that Section 9 of the Act of the
29th Legislature, approved April 17th, 1905 (Laws 1905 p.
117 358 c. 148), known as the "Kennedy Bill", purporting to levy a tax upon your petitioner, was void because the same was repugnant to the Fourteenth Amendment to the Constitution of the United States and further because it attempted to lay an embargo on interstate and foreign commerce, but your petitioner's said claim was overruled by the Supreme Court of the State of Texas, and the decision of said Court was in favor of the validity of the said Section of said law as appears by the record or proceedings in said cause which is herewith submitted.

Wherefore your petitioner prays the allowance of the writ of error returnable in the Supreme Court of the United States and for citation, and your petitioner will ever pray.

THE SOUTHWESTERN OIL COMPANY,
By GREER, MINOR & MILLER,
Attorneys for Petitioner.

GEORGE C. GREER,
Of Counsel.

Let the writ of error issue as prayed for.
This 12th day of March, 1908.

R. R. GAINES,
Chief Justice of the Supreme Court of the State of Texas.

(Endorsed:) The Southwestern Oil Co., *vs.* The State of Texas. Petition for Allowance of Writ of Error. Filed in Supreme Court of Texas, March 12, 1908. F. T. Connerly, Clerk.

118 *Order Allowing Writ of Error and Approving Bond.*

Filed March 12, 1908.

The Supreme Court of the State of Texas.

THE SOUTHWESTERN OIL COMPANY, Plaintiff in Error,
versus
THE STATE OF TEXAS, Defendant in Error.

The above entitled matter came on to be heard upon the petition of the Plaintiff in Error therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Texas, and upon examination of the said petition and record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter,—

It is ordered that a writ of error be and is hereby allowed to this court from the Supreme Court of the United States, and that the bond presented by said plaintiff in error be and the same is hereby approved.

R. R. GAINES,
Chief Justice of the Supreme Court of the State of Texas.

(Endorsed:) The Southwestern Oil Co. *vs.* The State of Texas. Order allowing Writ of Error and Approving Bond. Filed in the Supreme Court of Texas, March 12, 1908. F. T. Connerly, Clerk.

119 *Bond on Writ of Error.*

Filed March 12, 1908.

The Supreme Court of the State of Texas.

THE SOUTHWESTERN OIL COMPANY, Plaintiff in Error,
versus
THE STATE OF TEXAS, Defendant in Error.

Know all men by these presents:

That we, The Southwestern Oil Company as Principal and *American Surety Company of New York* as Sureties are held and firmly bound unto the State of Texas in the sum of One Thousand ($1000.00) Dollars to be paid to the said Obligees, their successors, representatives and assigns, to the payment of which well and truly

to be made we bind ourselves, our successors, heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 12th day of March, A. D. 1908.

Whereas the above named plaintiff in error hath prosecuted a writ of error in the Supreme Court of the United States to reverse a judgment rendered in the above entitled action by the Supreme Court of the State of Texas.

Now, therefore, the Condition of this obligation is such — if the above named plaintiff in error shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

[SEAL.] THE SOUTHWESTERN OIL COMPANY,
By ADOLPH H. STILLE, *President.*

120 [SEAL.] AMERICAN SURETY COMPANY OF NEW YORK,
By W. F. BUCKLEY, *Res. Vice President.*
By GEO. E. SHELLEY, *Res. Ass't Secretary.*

Attest:
A. S. LEWIS,
Ass't Secretary,
By —— ——.

THE STATE OF TEXAS, *County of Harris:*

On this the 10th day of March, 1908, before me personally appeared Adolph H. Stille, to me well known to be the person described in and who executed the foregoing bond as president of The Southwestern Oil Company, and acknowledged the same to be the free act and deed of said corporation, executed for the purpose and consideration therein expressed, and that as such president he is duly authorized to execute the same in behalf of said Company.

Given under my hand and seal of office this the 10th day of March, 1908.

[SEAL.] LOUIS C. PHELPS,
Notary Public in and for Harris County, Texas.

THE STATE OF TEXAS, *County of Travis:*

On this the 12th day of March, A. D. 1908 personally appeared before me W. F. Buckley, who being duly sworn deposes and says that he is a member of the local board of directors for the City of Austin of American Surety Company of New York; that the seal affixed to the foregoing instrument was signed and sealed on behalf of said corporation by authority of its board of directors and the said W. F. Buckley acknowledged the said instrument to be the

121 free act and deed of said corporation executed by authority of its board of directors and acknowledges said instrument to

be the free act and deed of said corporation for the purposes and consideration therein expressed.

W. F. BUCKLEY.

Given under my hand and seal of office this 12th day of March, 1908.

[SEAL.] W. T. DECHERD,
Notary Public, Travis County, Texas.

I hereby approve the foregoing bond and sureties this the 12th day of March, A. D. 1908.

R. R. GAINES,
Chief Justice of the Supreme Court of the State of Texas.

(Endorsed:) The Southwestern Oil Co. *vs.* The State of Texas. Bond on Writ of Error. Filed in Supreme Court of Texas, March 12, 1908. F. T. Connerly, Clerk.

Certificate as to Federal Question.

Filed March 12, 1908.

In the Supreme Court of the State of Texas.

THE SOUTHWESTERN OIL CO., Plaintiff in Error,
vs.
THE STATE OF TEXAS, Defendant in Error.

It being made to appear to the Court that the opinion delivered herein does not discuss many of the issues and questions relied upon by the plaintiff in error, such questions being passed upon by this Court in the case of The Texas Company *vs.* J. W. Stevens, *et al.* The opinion in this case merely referring to the opinion in that case for a discussion of such questions, among which being the Federal question that Section 9 of the Act of the Twenty-
122 ninth Legislature approved April 17th, 1905, (Laws 1905 Chap. 148, p. 358) known as the "Kennedy Bill" is repugnant to and in contravention of the Fourteenth Amendment to the Constitution of the United States, in that it denied to the plaintiff in error the equal protection of the law. To the end, therefore, that it may clearly appear that said Federal question was raised and passed upon by this Court, at the request of counsel for plaintiff in error, the Court makes the following certificate, to-wit:

It is hereby certified that in this Court, and in the courts below, there was drawn in question the validity of said Section 9 of the Act of the Twenty-ninth Legislature approved April 17th, 1905, (Laws 1905, Chap. 148, p. 356) known as the "Kennedy Bill" levying a tax of two (2%) per cent. per annum upon the gross sales or each and every person, association of persons, or corporations, engaged in the wholesale business of coal oil, naptha, benzine or any

other mineral oils refined from petroleum, and any and all mineral oils, and a like tax upon the fair market value of all of said articles received, possessed, or disposed of in any other manner than by sale by such persons, association of persons, or corporations, on the ground that the same was repugnant to and in contravention of that clause of the Fourteenth Amendment to the constitution of the United States denying to the States the right or power to deny to any person within its jurisdiction the equal protection of the law; the said plaintiff in error relying upon and urging said objection to the validity of said law, but which said statute was sustained and its validity upheld by the decision rendered herein, notwithstanding such objections.

It is further ordered that this certificate be entered of
123 record in the proceedings of this Court, and made a part of the record of this cause.

This the 12th day of March, 1908.

R. R. GAINES,
Chief Justice of the Supreme Court of Texas.

(Endorsed:) The Southwestern Oil Co., *vs.* The State of Texas. Certificate as to Federal question. Filed in Supreme Court of Texas, March 12th, 1908. F. T. Connerly, Clerk.

124 UNITED STATES OF AMERICA:

The President of the United States to the Honorable Judges of the Supreme Court of the State of Texas, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Texas before you, or some of you, being the highest Court of law or equity of the said State, in which a decision could be had in said suit between The Southwestern Oil Company, a corporation duly incorporated under the Laws of the State of Texas as Plaintiff in Error in said court, but defendant in the trial court, and the State of Texas as Defendant in Error in said Court, but plaintiff in the trial court, wherein was drawn in question the validity of a statute of said State of Texas on the ground of its being repugnant to the Constitution and Laws of the United States and the decision was in favor of its validity; said law thus complained of being the Act of the Twenty Ninth Legislature of the State of Texas, approved April 17th, 1905, (Laws 1905 p. 358 c. 148), known as the "Kennedy Bill," it being claimed that Section Nine (9) of the said Act was repugnant to and in contravention of the Fourteenth Amendment to the Constitution of the United States, and the Acts of Congress enacted thereunder, and further that it is repugnant to and in contravention of the Constitution of the United States, in that said Section 9 of said Act attempts to lay a tax or embargo on interstate and foreign commerce; a manifest error hath happened to the great damage of The South-western Oil Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given,

that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this
125 writ, so that you have the same at Washington within thirty (30) days from the date hereof, in the Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States the 12th day of March in the Year of Our Lord One Thousand Nine Hundred and Eight.

[The Seal of the Circuit Court, Austin, Western Dist. Texas.]

D. H. HART,
Clerk of the United States Circuit Court for the Western District of Texas, at Austin, Texas.

Allowed by
R. R. GAINES,
Chief Justice of the Supreme Court of the State of Texas.

125½ [Endorsed:] 5. The Southwestern Oil Co. *vs.* The State of Texas. Writ of Error. Original. Filed in Supreme Court of Texas Mch. 12, 1908. F. T. Connerly, Clerk.

126 United States of America to the State of Texas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within Thirty (30) Days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the Supreme Court of the State of Texas, wherein the Southwestern Oil Company is plaintiff in error, and you are defendants in error to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Ruben R. Gaines, Chief Justice of the Supreme Court of the State of Texas this 12th day of March in the Year of our Lord One Thousand Nine Hundred and Eight.

R. R. GAINES,
Chief Justice of the Supreme Court of the State of Texas.

Copy of the within citation received this 12th day of March, A. D. 1908, and service thereof accepted.

T. M. CAMPBELL,
Governor of the State of Texas.
R. V. DAVIDSON,
Attorney General of the State of Texas.

126½ [Endorsed:] 6. Southern Oil Co. *vs.* The State of Texas. Citation on Writ. Original. Filed in Supreme Court of Texas M'ch 12, 1908. F. T. Connerly, Clerk.

127 *Assignments of Error.*

Filed Mar. 12, 1908.

The Supreme Court of the State of Texas.

THE SOUTHWESTERN OIL COMPANY, Plaintiff in Error,
versus
THE STATE OF TEXAS, Defendant in Error.

Comes now The Southwestern Oil Company, defendant in the Court below, and plaintiff in error here, and files the following assignments of error upon which it will reply in the prosecution of its writ of error in the above entitled cause.

First.

The Supreme Court of the State of Texas, as well as the courts below, erred in holding and deciding that Section 9 of the Act of the 29th Legislature approved April 17th, 1905, (Laws 1905 p. 358 c. 148), known as the "Kennedy Bill," to-wit:

"Each and every person, association of persons or corporations created by the Laws of this or any other State or nation, which shall engage in their own name, or in the name of others, or in the name of their representatives or agents, in this State, in *wholesale business* of coal oil, naptha, benzine or any other mineral oils refined from petroleum, and any and all mineral oils, shall pay an annual tax of two per cent. upon *their gross receipts* from any and all sales in this State of any of said articles in section 9 of this Act hereinabove mentioned, and an annual tax of two per cent. of the cash market value of any and all of said articles that may be received or possessed or handled or disposed of in any manner, other than by sale in this State; and it is hereby expressly provided that delivery to or possession by any person, association of persons or corporation in this State of any of the articles hereinabove mentioned in Section 9 of this Act, from whatever source the same may have been received, shall for the purpose of this Act be held and considered such a sale and such ownership and possession of such articles and property (where no sale is made) as will and shall subject the same to the tax herein provided for. Said tax herein provided for shall be paid to the State Treasurer quarterly, and every such person, agent, association of persons, or corporation so owning, controlling or managing such business shall, on or before the first day of April, and quarterly thereafter, report to the Comptroller under oath of

128 the president, treasurer, superintendent or some other officer of said corporation or association, or some duly authorized agent thereof, the amount received by them from such business in this State. Should any person, association of persons or corporation, or the officers or agents of any such corporation, person or association of persons herein named, fail to make the report herein provided for, and pay said taxes for thirty days after the termina-

tion of any quarter of the year, then he shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not less than fifty nor more than one hundred dollars. Each and every day after said thirty days have expired shall be deemed a separate offense. In addition thereto, in the event of the failure of the officers or agents of any such company or corporation to make the reports and pay said taxes, for thirty days after the termination of any quarter of the year, each and every such company or corporation, or their officers or agents so failing, shall forfeit and pay to the State the sum of Twenty-five dollars for each day said report and payment are delayed which forfeiture and taxes shall be sued for by the Attorney General in the name of the State. For the purpose of suits and prosecutions provided for in this Article, venue and jurisdiction are hereby expressly conferred upon the courts of Travis County and service may be had upon any officer or agent of such company or corporation in the State, and such service shall in all respects be held legal and valid. The tax herein levied shall be in addition to all other taxes levied by law,"

was constitutional and not repugnant to or in contravention of the 14th Amendment to the Constitution of the United States, prohibiting the State from depriving any person of life, liberty or property without due process of law, or from denying to any person within its jurisdiction the equal protection of the laws, and in rendering judgment against the plaintiff in error for the sum of $1129.61 because,

(a) Said Section 9 of the Act in question arbitrarily selects, without any reasonable grounds or difference which bears a just relation to such attempted classification, and levies upon the wholesale dealer in the business of coal oil, naptha, benzine or any other mineral oils refined from petroleum, and any and all mineral oils, a tax from fifty to one hundred times greater than is levied by the laws of said State upon any other wholesade dealer in any other articles whatsoever, as is apparent from Art. 5049 of the Revised Statutes of the State of Texas as follows:

129 "From every merchant whose annual purchases amount to less than two thousand dollars, three dollars; from every merchant whose annual purchases amount to two thousand dollars or less than five thousand dollars, six dollars; from every merchant whose annual purchases amount to five thousand dollars or less than ten thousand dollars, twelve dollars; from every merchant whose annual purchases amount to ten thousand dollars or less than fifteen thousand dollars, twenty dollars; from every merchant whose annual purchases amount to fifteen thousand dollars or less than twenty-five thousand dollars, twenty-five dollars; from every merchant whose annual purchases amount to twenty-five thousand dollars or less than fifty thousand dollars, sixty dollars; from every merchant whose annual purchases amount to fifty thousand dollars or less than one hundred and fifty thousand dollars, one hundred and twenty-five dollars; from every merchant whose annual purchases amount to one hundred and fifty thousand dollars or less than two hundred and fifty thousand dollars, one hundred and fifty dollars; from every

merchant whose annual purchases amount to two hundred and fifty thousand dollars or less than five hundred thousand dollars, two hundred dollars; from every merchant whose annual purchases amount to five hundred thousand dollars or less than seven hundred and fifty thousand dollars, two hundred and fifty dollars; from every merchant whose annual purchases amount to seven hundred and fifty thousand dollars or more, three hundred dollars."

(*b*) Said Section 9 of the Act in question denies to plaintiff in error the equal protection of the law guaranteed to it under the Fourteenth Amendment to the Constitution of the United States, in that a wholesale dealer in coal oil, naptha, benzine or other mineral oils refined from petroleum, and any and all other mineral oils, is arbitrarily selected out of all wholesale dealers, without any reasonable grounds or difference justifying such selection, and required to pay an annual tax of two per cent. upon his gross receipts from any and all sales of said oil in this State, and an annual tax of two per cent. on the cash market value of any and all of said articles that he may receive possession of, handle or dispose of in any other manner than by sale in this State, and declares that the delivery to or possession by any person, association of persons, or corporations in this State of any of the articles hereinabove mentioned from whatever source the same may have been re-
130 ceived, shall, for the purpose of said Act, be held and considered such a sale and such ownership and possession of such articles and property (where no sale is made) as will, and shall subject the same to the tax herein provided for, thus fixing the amount of his gross receipts from sales and the fair market value of his unsold products, as the basis for calculating said tax; thereby including profits realized or to be realized from such sales, whereas all other merchants in said State in whatever article owned, handled, possessed, sold or disposed of are taxed at a much less sum on a graduated scale in proportion to the amount of their purchases, as prescribed by Article 5047 of the Revised Statutes of Texas, thus fixing the amount of their purchase as the basis for calculating said tax and excluding the profits realized or to be realized which are included in the tax against wholesale dealers in oil, etc.

(*c*) Said Section 9 of said Law denies to plaintiff in error the equal protection of the law guaranteed to it by the Fourteenth Amendment to the Constitution of the United States, in that the failure to pay said tax for a period of thirty days, renders it guilty of a misdemeanor, subject to a fine upon conviction of not less than fifty nor more than one hundred dollars, and each and every day after the expiration of said thirty days is deemed a separate offense; and in addition thereto, after the expiration of said thirty days, subjects it to a forfeiture of $25.00 for each day the report provided for in said section and the payment of said taxes are delayed; while the only punishment against any other wholesale dealer or merchant in any other article whatever is liability to a fine in any sum not less than the amount of the taxes due and not more than double that sum and cost of the prosecution, (Art. 112 of the Penal
131 Code); and when any such person is prosecuted under said Article 112, he has the right at any time before conviction,

to have such prosecution dismissed upon the payment of the tax and all costs of said prosecution and procuring the license to pursue or follow the occupation for the pursuing which, without license, the prosecution was instituted; and no prosecution can be commenced against any person after the procuring of said license notwithstanding they may have followed such occupation before procuring said license, provided said license covers the time said person has actually followed said occupation, calling or profession. Plaintiff in Error's obligation to pay said debt is no greater than the obligation of any other wholesale dealer to pay his tax, nor can its failure be more criminal, hence the different treatment in the two cases is purely arbitrary, unreasonable and not based upon any difference which bears a just relation to the attempted classification.

Second.

The Supreme Court of the State of Texas, as well as the Courts below, erred in holding and deciding that said Section 9 of the Act above referred to was valid and not repugnant to or in contravention of the Fourteenth Amendment to the Constitution of the United States prohibiting any state from depriving any person within its jurisdiction of his property without due process of law, and from denying to any person within its jurisdiction the equal protection of the law, in that it singles out the wholesale dealer in coal oil, naptha and benzine or any other mineral oils refined from petroleum, and any and all mineral oils, from among all wholesale merchants in any other articles of product whatever, and subjects him to the greater tax as shown in our first assignment of error, levied upon a different and more onerous basis in that the gross amount
132 of his receipts and the fair market value of its product on hand is made the basis for fixing the amount of his tax, thus including the profits realized or to be realized on sales by him, whereas the basis for fixing the amount of tax levied against all other wholesale dealers in any other article or commodity whatever is fixed by the amount of their purchase and not upon the gross amount of their sales, and the fair market value of the products on hand; and for a failure to comply with said law greater and more onerous penalties and forfeitures are visited upon a dealer for his said failure to pay said tax than is visited upon a delinquent merchant or wholesale dealer in any other article or commodity; the wholesale dealer in said oils being subject to a fine, after 30 days' delinquency, of not less than fifty or more than one hundred dollars, and each day's delinquency thereafter, is made a separate offense subject to such penalty, and in addition thereto, for each day after the expiration of said 30 days is visited with a forfeiture of $25.00 per day, without any means by which it may relieve itself from such punishment or forfeiture; whereas the delinquent wholesale dealer in any other article or commodity can in no event be fined more than double the amount of tax and the cost of the prosecution and can relieve himself of such punishment by the payment of the amount of tax and cost of court at any time before conviction. The said difference in tax and the difference in penalties and forfeitures arising

from the breach thereof being made arbitrarily and not based upon any reasonable ground or difference which bears any just or proper relation to the attempted classification.

Third.

133 The Court erred in holding and deciding that Section 9 of the Act in question was valid and constitutional and in rendering judgment against plaintiff in error for the sum of $1129.61, because the said Section of said Act attempts to lay a tax or embargo on interstate and foreign commerce, and the law not affording any means whereby the tax levied on transactions which do not constitute interstate or foreign commerce can be separated from those parts which do attempt to tax transactions in interstate or foreign commerce, and it being apparent that the Legislature would not have passed the law without the unconstitutional and void section, the whole law is unconstitutional and void.

Wherefore, and for other reasons apparent in the record and proceedings, aforesaid, the said plaintiff in error prays that the judgment aforesaid may be reversed, annulled and altogether held for naught, and that judgment be here rendered for plaintiff in error, or in the alternative, that said cause be remanded to the State Court for such further proceedings as may be in accordance with the judgment of this court, and for such other relief as it may be entitled to etc.

GREER, MINOR & MILLER,
Attorneys for Southwestern Oil Company, Plaintiff in Error.

GEORGE C. GREER,
Of Counsel.

(Endorsed:) The Southwestern Oil Co. *vs.* The State of Texas. Assignments of Error. Filed in Supreme Court of Texas, March 12th, 1908. F. T. Connerly, Clerk.

134 CLERK'S OFFICE, SUPREME COURT.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, do hereby certify that the foregoing one hundred and thirty-three pages, except pages 124, 125 and 126, contain a true and correct copy of a transcript of the record of all the proceedings had in the District Court of Travis County, for the 26th Judicial District of Texas, in the Court of Civil Appeals of the Third Supreme Judicial District of Texas, at Austin, Texas, and in the Supreme Court of the State of Texas, as the same appear of record and on file in this office in cause No. 1715, The Southwestern Oil Company, Plaintiff in Error, *vs.* The State of Texas, Defendant in Error.

I further certify that the pages herein numbered 124 and 125 is the original Writ of Error, of which a copy has been lodged and is now on file in this office, and that the page herein numbered 126 is the original Citation in Error, of which a copy has been lodged and is now on file in this office.

In testimony whereof, I have hereunto affixed my signature, with the seal of the Supreme Court of Texas, at the City of Austin, this the 24th day of March, A. D. 1908.

[Seal Supreme Court of the State of Texas.]

F. T. CONNERLY,
Clerk of the Supreme Court of Texas.

135 In the Supreme Court of the United States.

THE SOUTHWESTERN OIL COMPANY, Plaintiff in Error,
vs.
THE STATE OF TEXAS, Defendant in Error.

Now comes the Plaintiff in Error, The Southwestern Oil Company, by its attorneys, and files herein a statement of the errors upon which it intends to rely, and the parts of the record which it thinks necessary for the consideration thereof, to-wit:

First.

The plaintiff in error will urge each and all of its assignments of error as filed in the Supreme Court of the State of Texas, and appearing on pages 127 to 133, both inclusive, of the original record herein.

Second.

The Plaintiff in Error, The Southwestern Oil Company, deems the following portions of the record as necessary for the consideration of its said assignments of error, to-wit:

(1) "The Caption" (Rec., p. 1).

(2) Plaintiff's First Amended Original Petition (Rec. pp. 1 to 9, inclusive).

(3) Defendant's Answer (Rec. pp. 10 to 19, inclusive).

(4) Judgment of the District Court of Travis County, Texas (Rec. pp. 20 to 23 inclusive).

(5) Statement of the facts (Rec. pp. 24 to 33, inclusive).

(6) The caption and introductory paragraph to plaintiff in error's assignments of error filed in the District Court (Rec. p. 34), and its second and third assignments of error filed therein (Rec. p. 34 and 35), and the signature of counsel thereto (Rec. p. 37).

136 (7) Supersedeas bond filed in the District Court of Travis County, Texas (Rec. pp. 40 to 45, inclusive), omitting therefrom the copy of the judgment rendered in said Cause, it having been previously copied.

(8) Opinion of the Court of Civil Appeals (Rec. p. 48).

(9) Judgment of the Court of Civil Appeals (Rec. p. 49).

(10) Caption and introductory paragraph to plaintiff in error's motion for a rehearing filed in the court of civil appeals (Rec. p. 50), and its 10th and 11th specification of errors set up thereunder

(Rec. pp. 53 and 54), with the prayer contained therein (Rec. p. 57).

(11) Order of the Court of Civil Appeals overruling plaintiff in error's motion for a rehearing (Rec. p. 57).

(12) Caption and introductory paragraph of the petition for writ of error to the Supreme Court of the State of Texas down to "Nature and history of the cause" (Rec. p. 58), and the 4th assignment of error, proposition, citation of authorities and argument thereunder (Rec. pp. 96 to 98) and prayer for writ of error (Rec. p. 108).

(13) Order of the Supreme Court granting writ of error (Rec. p. 109).

(14) Acceptance of service of writ of error (Rec. p. 109).

(15) Order of submission of case in Supreme Court (Rec. 110).

(16) Opinion of the Supreme Court of the State of Texas (Rec. p. 110 and 111).

(17) Judgment of the Supreme Court of the State of Texas (Rec. pp. 111 and 112).

(18) Introductory paragraph to motion for rehearing in the Supreme Court of the State of Texas (Rec. 112) and 4th specification of error in said motion for rehearing (Rec. 113 and 114) and prayer (Rec. p. 114).

(19) Acceptance of service of the motion for a rehearing in the Supreme Court of the State of Texas (Rec. p. 115).

(20) Order of the Supreme Court of the State of Texas overruling motion for a rehearing (Rec. p. 115).

(21) Petition for allowance of writ of error with order allowing the same endorsed thereon (Rec. p. 116 and 117).

137 (22) Order allowing writ of error and approving writ of error bond (Rec. p. 118).

(23) Bond on writ of error (Rec. pp. 119 to 121, inclusive).

(24) Certificate as to Federal question (Rec. pp. 121 to 123, inclusive).

(25) Writ of error (Rec. p. 124 and 125).

(26) Citation on writ of error and acceptance of service (Rec. p. 126).

(27) Assignments of error (Rec. pp. 127 to 133, inclusive).

(28) Certificate of the Clerk of the Supreme Court of the State of Texas.

GREER, MINOR & MILLER,
Attorneys for the Plaintiff in Error,
The Southwestern Oil Company.

GEO. C. GREER,
Of Counsel.

We hereby accept service of a copy of the foregoing motion and hereby agree that the foregoing assignments of error and portions of the record therein set out may be printed by the Clerk and no other portions of the record herein.

This 7th day of April, A. D. 1908.

R. V. DAVIDSON,
Attorney General of the State of Texas.

138 [Endorsed:] 697, 2110. The Southwestern Oil Co., Plaintiff in Error, *vs.* The State of Texas, Defendant in Error. Statement of the errors upon which the plaintiff in error intends to rely, and the parts of the record which it thinks necessary for the consideration thereof.

138 [Endorsed:] 697, 21100. The Southwestern Oil Co., Plainber Term, 1907. Term No. 697. The Southwestern Oil Co., Pl'ff in Error, *vs.* The State of Texas. Statement by Counsel for pl'ff in error of errors relied on and designation of parts of record to be printed & consent of counsel for def't in error to such designation. Filed April 11th, 1908.

Endorsed on cover: File No. 21,100. Texas supreme court. Term No. 697. The Southwestern Oil Company, plaintiff in error, *vs.* The State of Texas. Filed April 10th, 1908. File No. 21,100.

No. 697

SUPREME COURT OF THE UNITED STATES

THE SOUTHWESTERN OIL COMPANY, Plaintiff in Error,

vs.

THE STATE OF TEXAS.

In Error to the Supreme Court of the State of Texas.

Brief for the Southwestern Oil Company, Plaintiff in Error.

The Twenty Ninth Legislature of the State of Texas passed an act approved April 17th, 1905, commonly called the "Kennedy Law," under the ninth Section of which the State claimed the taxes out of which this controversy arose. Section 9, (See Chapter 148, General Laws Twenty Ninth Legislture, p. 364), reads as follows:

> "Each and every person, association of persons or corporation created by the laws of this or any other State or nation, which shall engage in their own name, or in the name of others, or in the name of their representatives or agents, in this State, in the *wholesale business* of coal oil, naptha, benzine or any other mineral oils refined from petroleum, and any and all mineral oils, shall pay an annual tax of two per cent upon *their gross*

receipts from any and all sales in this State of any of said articles in section 9 of this Act hereinbefore mentioned, and an annual tax of two per cent of the cash market value of any and all of said articles that may be received or possessed or handled or disposed of in any manner other than by sale in *this* state; and it is hereby expressly provided that delivery to or possession by any person, association of persons or corporation in this State of any of the articles hereinabove mentioned in section 9 of this Act, from whatever source the same may have been received, shall for the purpose of this Act be held and considered such a sale and such ownership and possession of such articles and property (where no sale is made) as will and shall subject the same to the tax herein provided for. Said tax herein provided for shall be paid to the State Treasurer quarterly, and every such person, agent, association of persons, or corporation so owning, controlling or managing such business shall, on or before the first day of April, and quarterly thereafter, report to the Comptroller under oath of the president, treasurer, superintendent or some other officer of said corporation or association, or some duly authorized agent thereof, the amount received by them from such business in this State. Should any person, association of persons or corporation, or the officers or agents of any such corporation, person or association of persons herein named, fail to make the report herein provided for, and pay taxes for thirty days after the termination of any quarter of the year, then he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than fifty nor more than one hundred dollars. Each and every day after said thirty days have expired shall be

deemed a separate offense. In addition thereto, in the event of the failure of the officers or agents of any such company or corporation to make the reports and pay said taxes, for thirty days after the termination of any quarter of the year, each and every company or corporation, or their officers or agents so failing, shall forfeit and pay to the State the sum of twenty-five dollars for each day said report and payment are delayed, which forfeiture and taxes shall be sued for by the Attorney General in the name of the State. For the purpose of suits and prosecutions provided for in this article, venue and jurisdiction are hereby expressly conferred upon the courts of Travis county, and service may be had upon any officer or agent of such company or corporation in the State, and such service shall in all respects be held legal and valid. The tax herein levied shall be in addition to all other taxes levied by law."

In addition to the tax on wholesale dealers in refined oils, imposed by Sec. 9, there is imposed by Sec. 13 of the Act, on any individual, joint stock company, co-partnership or corporation which owns, controls or manages or leases an oil well in this State, a tax of one per cent of the value of the gross amount of oil produced; and by Section 12 of said Act there is imposed on any individual, joint stock association, company, co-partnership or corporation owning or operating a pipe line in this State used for the transmission of oil, natural or artificial gas, or for steam, or for the transmission of articles by pneumatic or other power, a tax of two per cent on the gross receipts.

Reports are required under both and penalties fixed similar to those prescribed in Section 9. Other taxes are imposed by the Act in question based on the gross receipts; but the tax fixed by Section 9 is the only tax im-

posed by this act on merchants, or dealers; and Sections 9, 12 and 13 are the only portions of the act dealing with the oil business peculiarly.

Between April 17, 1905 and July 1st, 1905, the Southwestern Oil Company had the following transactions, as to which this suit was brought, and the State raised the question of the liability of the Company under the section quoted above:

I.

"The Southwestern Oil Company between said dates sold its refined oils and refined products of crude oil manufactured by itself in Texas, it being a refining company, for which it received $19,902.67.

II.

During the same period the Southwestern Oil Company sold refined oils and other products refined from Petroleum oil, not manufactured by itself, but purchased for the purpose of selling, to the amount of $8,654.88.

III.

During the same period said company sold in Texas of crude oil which it has bought in Texas, and received from said sales, $175.39.

IV.

During the same period and at the end thereof said Southwestern Oil Co. had on hand refined oils and other products refined from petroleum manufactured by itself in Texas, but not sold, or otherwise disposed of, of the value of $37,798.82.

V.

During the same period and at the end thereof said Southwestern Oil Co. had in its possession refined oils and other products refined from petroleum which were

purchased by it and not manufactured by it, and not sold at the end of said period, of the value of $1,548.31.

VI.

During the same period and at the end thereof the Southwestern Oil Co. had on hand crude oil purchased for the purpose of refining but not as yet refined, or otherwise disposed of during said period, of the value of $3,847.21.

VII.

During the said period the Southwestern Oil Co. purchased 166 6-10 barrels of semi-crude oil in Louisiana and shipped the same into this State for the purpose of refining the same, which either was refined during said period, or held by it for said purpose, of the value of $149.94.

As to the oil referred to in paragraph I, hereof, $11,941.60 worth thereof was sold to intermediate persons who sold again for profit, the sales to such middlemen being in quantities ranging from 5 to 200 gallons each; and the balance of said oil referred to in paragraph I, to-wit, $7,961.06 worth thereof, was sold to consumers direct, the sales ranging from 1 to 10 gallons each.

As to the oil referred to in paragraph II hereof, the amount of $5,192.89 worth thereof was sold to intermediate or middlemen who sold again for profit, the sales ranging in quantities from 5 to 200 gallons each; and as to the balance of said oil referred to in paragraph II, to-wit, $3,461.94 worth thereof, the same was sold direct to consumers in quantities ranging from one to ten gallons."

The State filed suit against the Plaintiff in Error, Southwestern Oil Company, in the district court of Travis County setting up said law and transactions and sought to recover the tax imposed by Sec. 9, amounting to two per cent on all of said transactions. The defendant answered and urged among other demurrers the following:

"This defendant further excepts to each and every moneyed demand made by plaintiff in its petition against this defendant, and for ground of this exception says it is apparent from said petition that the sole alleged warrant or basis for each such sum demanded of this defendant is section 9 of the purported law, styled the Kennedy Bill, and constituting Chapter No. 148 of the Acts of the 29th Legislature of Texas, and that said Section of said law is wholly invalid for this:

(3) That if said section be held to be an attempt to impose an occupation tax, yet the same is void because it is in contravention of the 14th amendment to the Constitution of the United States in that it denies the equal protection of the law."

Various other demurrers, to which it is not necessary to refer, and a general denial were embraced in the answer.

The court reserved his ruling on the demurrers until the evidence was heard. Upon trial on the facts the defendant admitted the transactions occurred as alleged. Certain other evidence was offered with regard to the history of the bill, not material on this appeal. The trial court rendered judgment December 14, 1905, in favor of the State for two per cent on the gross receipts from all sales of refined oils, and on the cash value of such oils on hand, denying any recovery as to crude oil or sales direct to the consumer; the total judgment being for $1129.61 besides all costs. (R. 12).

The defendant, Southwestern Oil Company, regularly and in due time, appealed from the judgment of the trial court to the Court of Civil Appeals of the Third Judicial District of Texas, assigning among other errors, the following:

"The court erred in rendering any judgment in favor of the plaintiff whatsoever, and against the defendant, as for taxes, because Section 9, of Chapter 148 of the Acts of 1905, the only law under which such taxes are

demandable or could be collected from this defendant, is unconstitutional and void as being in contravention of the 14th Amendment of the Constitution of the United States, and the Acts of Congress enacted thereunder."

The said Court of Civil Appeals overruled said assignment of error on Dec. 5, 1906 and in all things, affirmed the judgment of the trial court, (R. 22, 23), referring to its opinion in Producers' Oil Co. vs. Stephens, (99 S. W., R. 157), wherein the constitutionality of the same statute was involved, for its holding on the constitutional questions which had been raised against the statute in question.

The Southwestern Oil Company, as appellant filed a motion, within due time, for a rehearing, assigning among other errors, that section 9, the only law by virtue of which said taxes recovered were demandable or could be collected "is unconstitutional and void, as being in contravention of the Fourteenth Amendment to the Constitution of the United States, and the Acts of Congress enacted thereunder." (R. 24.) The motion for a rehearing was on Jan. 16, 1907, overruled by the Court of Civil Appeals; whereupon, the Southwestern Oil Company on February 13, 1907, regularly and in due time filed its petition in the Supreme Court of the State of Texas for a Writ of Error to the said Court of Civil Appeals, to have said cause removed to the Supreme Court of this State and there reviewed, assigning, among other errors committed by the said Court of Civil Appeals in its judgment in said case, that said court erred in refusing to sustain and in overruling appellant's tenth assignment of error to the effect that the trial court erred in rendering any judgment in favor of the plaintiff whatsoever and against the defendants, as and for taxes, because Section 9 of Chapter 148 of the Acts of 1905, the only law under which such taxes are demandable, or could be collected from this defendant is unconstitutional and void as being *in* contravention of the Fourteenth Amend-

ment to the Constitution of the United States, and the acts of congress enacted thereunder under which assignment it urged this

PROPOSITION.

"This act singles out wholesale dealers in oil and certain products refined from petroleum from among all other wholesale dealers in other articles, as sugar, bacon, coal and iron, and imposes a tax many fold greater than on any other class of wholesale dealers and also unusual penalties and forfeitures without any reasonable grounds for such distinction. Such classification is capricious and arbitrary, in that it does not apply to persons engaged in like business, as dealers in coal, etc., and therefore denies the wholesale dealers in oil, etc., the equal protection of the law."

On April 24, 1907 the Supreme Court of Texas granted the application for a writ of error; but on June 26, 1907 rendered an opinion and judgment, overruling said assignment of error, and all others, and in all things affirmed the judgment of the lower court, and of the Court of Civil Appeals. (R. 29 and 30).

(Reference was made to the opinion of the Supreme Court in Texas Company vs. Stephens, 103 S. W., R. 481 for the ruling of the Court on all questions involved in this case; the Texas Company case involving the same questions).

A motion for a rehearing was seasonably filed, (July 10, 1907), in the State Supreme Court by plaintiff in error in which motion the Southwestern Oil Company set up, among other errors, as grounds for its motion that the Supreme Court erred in its said opinion and judgment, "in refusing to sustain plaintiff in error's fourth assignment of error, to the effect that the Court of Civil Appeals erred in overruling the plaintiff in error's tenth assignment of error, which was to the effect that the trial Court erred in rendering any

judgment in favor of the defendant in error whatsoever, for taxes under Section 9 of Chapter 148 of the Acts of 1905, because said section of said act is unconstitutional and void as being in contravention of the fourteenth amendment to the Constitution of the United States, in that said Section 9 of Chapter 148 of the Acts of 1905 deprives the plaintiff in error of the equal protection of the laws, or of the protection of equal laws."

The motion was overruled on Nov. 13, 1907, by which the judgment of the Supreme Court of the State of Texas, the highest court in the State in which a decision in said suit could be had, became final, and the question as to whether or not said statute was repugnant to the Fourteenth Amendment, passed on finally, adversely to the contention of plaintiff in error.

On March 12, 1908, the Southwestern Oil Company, plaintiff in error, filed in the Supreme Court of the State of Texas, its petition for allowance of writ or error to that court from the Supreme Court of the United States, which was on said date granted and bond filed and approved. The writ of Error issued to the Supreme Court of the State and was allowed by Chief Justice R. R. Gaines on the same date and citation issued to the State of Texas, defendant in error, and on March 12, 1908 a copy being received, service was accepted by the Governor and the Attorney General of the State, and this cause is removed on writ of error to this court for review.

In order to make clear that the federal question relied on was raised and passed on by the Supreme Court of the State, that court filed on March 12th, 1908 the following certificate, made a part of the record, (R. 35, 36).

"Certificate as to Federal Question.

Filed March 12, 1908.

In the Supreme Court of the State of Texas.

The Southwestern Oil Co., Plaintiff in Error,

vs.

The State of Texas, Defendant in Error.

It being made to appear to the Court that the opinion delivered herein does not discuss many of the issues and questions relied upon by the plaintiff in error, such questions being passed upon by this Court in the case of The Texas Company vs. J. W. Stevens, et al. The opinion in this case merely referring to the opinion in that case for a discussion of such questions, among which being the Federal question that Sections 9 of the Act of the Twenty Ninth Legislature approved April 17th, 1905, (Laws 1905, Chap. 148, p. 358) known as the "Kennedy Bill" is repugnant to and in contravention of the Fourteenth Amendment to the Constitution of the United States, in that it denied to the plaintiff in error the equal protection of the law. To the end, therefore, that it may clearly appear that said Federal question was raised and passed upon by this Court, at the request of counsel for plaintiff in error, the Court makes the following certificate, to-wit:

It is hereby certified that in this Court, and in the courts below, there was drawn in question the validity of said Section 9, of the Act of the Twenty-ninth Legislature approved April 17th, 1905, (Laws 1905, Chap. 148, p. 356) known as the "Kennedy Bill" levying a tax of two (2) per cent. per annum upon the gross sales of each and every person, association of persons, or corporations, engaged in the wholesale business of coal oil, naptha, benzine or any other mineral oils refined from petroleum, and any and all mineral oils, and a like tax upon the fair market value of all of said articles received, possessed, or disposed of in any other manner than by sale by such persons, association of persons, or corporations, on the ground that the same was repugnant to and in contravention of that clause of the Fourteenth Amendment to the constitution of the United States denying to the States the right or power to deny to any person within its jurisdiction the equal protection of the law; the said plaintiff in error relying upon and urging

said objection to the validity of said law, but which said statute was sustained and its validity upheld by the decision rendered herein, notwithstanding such objections.

It is further ordered that this certificate be entered of record in the proceedings of this Court, and made a part of the record of this cause.

This the 12th day of March, 1908.

R. R. GAINES,

Chief Justice of the Supreme Court of Texas."

The sole error relied on by Plaintiff in Error is embraced in our Frist Assignment, (R. 38-41), as follows:

SPECIFICATION OF ERROR.

First.

The Supreme Court of the State of Texas, as well as the courts below, erred in holding and deciding that Section 9 of the Act of the 29th Legislature approved April 17th, 1903, (Laws 1905, p. 358, C. 148) known as the "Kennedy Bill," to-wit: (the same that has been quoted in full hereinbefore and which therefore need not be copied again in this connection)—was constitutional and not repugnant to or in contravention of the 14th Amendment to the Constitution of the United States, prohibiting the State from depriving any person of life, liberty or property without due process of law, or from denying to any person within its jurisdiction the equal protection of the laws, and in rendering judgment against the plaintiff in error for the sum of $1129.61 because,

(a) Said section 9 of the Act in question arbitrarily selects, without any reasonable grounds or difference which bears a just relation to such attempted classification, and levies upon the wholesale dealer in the business of coal oil, naptha, benzine or any other mineral oils refined from petroleum, and any and all mineral oils, a tax from fifty to one hundred times greater than is levied

by the laws of said State upon any other wholesale dealer in other articles whatsoever, as is apparent from Art. 5049 of the Revised Statutes of the State of Texas as follows:

> "From every merchant whose annual purchases amount to less than two thousand dollars, three dollars; from every merchant whose annual purchases amount to two thousand dollars or less than five thousand dollars, six dollars; from every merchant whose annual purchases amount to five thousand dollars or less than ten thousand dollars, twelve dollars; from every merchant whose annual purchases amount to ten thousand dollars or less than fifteen thousand dollars twenty dollars; from every merchant whose annual purchases amount to fifteen thousand dollars or less than twenty-five thousand dollars, twenty-five dollars; from every merchant whose annual purchases amount to twenty-five thousand dollars or less than fifty thousand dollars, sixty dollars; from every merchant whose annual purchases amount to fifty thousand dollars or less than one hundred and fifty thousand dollars, one hundred and twenty-five dollars; from every merchant whose annual purchases amount to one hundred and fifty thousand dollars or less than two hundred and fifty thousand dollars, one hundred and fifty dollars; from every merchant whose annual purchase amount to two hundred and fifty thousand dollars or less than five hundred thousand dollars, two hundred dollars; from every merchant whose annual purchases amount to five hundred thousand dollars or less than seven hundred and fifty thousand dollars, two hundred and fifty dollars; from every merchant whose annual purchases amount to seven hundred and fifty thousand dollars, or more, three hundred dollars."

(b) Said Section 9 of the Act in question denies to plaintiff in error the equal protection of the law guaranteed to it under the Fourteenth Amendment to the Constitution of the United States, in that a wholesale dealer in coal oil, naptha, benzine or other mineral oils refined from petroleum, and any and all other mineral oils is arbitrarily selected out of all wholesale dealers, without any reasonable grounds or difference justifying such selection, and required to pay an annual tax of two per cent. upon his gross receipts from any and all sales of said oil in this State, and an annual tax of two per cent. on the cash market value of any and all of said articles that he may receive possession of, handle or dispose of in any other manner than by sale in this State, and declares that the delivery to or possession by any person, association of persons, or corporations in this State of any of the articles hereinabove mentioned from whatever source the same may have been recived, shall, for the purpose of said Act, be held and considered such a sale and such ownership and possession of such articles and property (where no sale is made) as will, and shall subject the same to the tax herein provided for, thus fixing the amount of his gross receipts from sales and the fair market value of his unsold products, as the basis for calculating said tax; thereby including profits realized or to be realized from such sales, whereas all other merchants in said State in whatever article owned, handled, possessed, sold or disposed of are taxed at a much less sum on a graduated scale in proportion to the amount of their purchases, as prescribed by Article 5047 of the Revised Statutes of Texas, thus fixing the amount of their purchase as the basis for calculating said tax and excluding the profits realized or to be realized which are included in the tax against wholesale dealers in oil, etc.

(c) Said Section 9 of said Law denies to plaintiff in error the equal protection of the law guaranteed to it

by the Fourteenth Amendment to the Constitution of the United States, in that the failure to pay said tax for a period of thirty days, renders it guilty of a misdemeanor, subject to a fine upon conviction of not less than fifty nor more than one hundred dollars, and each and every day after the expiration of said thirty days deemed a separate offense; and in addition thereto, after the expiration of said thirty days, subjects it to a forfeiture of $25.00 for each day the report provided for in said section and the payment of said taxes are delayed; while the only punishment against any other wholesale dealer or merchant in any other article whatever is liability to a fine in any sum not less than the amount of the taxes due and not more than double that sum and cost of the prosecution, (Art. 112 of the Penal Code); and when any such person is prosecuted under said Article 112, he has the right at any time before conviction, to have such prosecution dismissed upon the payment of the tax and all costs of said porsecution and procuring the license to pursue or follow the occupation for the pursuing which, without license, the prosecution was instituted; and no prosecution, can be commenced against any person after the procuring of said license not withstanding they may have followed such occupation before procuring said license, provided said license covers the time said person has actually followed said occupation, calling or profession. Plaintiff in Error's obligation to pay said debt is no greater than the obligation of any other wholesale dealer to pay his tax, nor can its failure be more criminal, hence the different treatment in the two cases is purely arbitrary, unreasonable and not based upon any difference which bears a just relation to the attempted classification.

AUTHORITIES.

G. C. & S. F. Ry Co. vs. Ellis, 165, U. S. 150.

Cotting vs. Kansas City Stock Yards Co. &c., 183, U. S. 109.

Bell's Gap Railroad vs. Pennsylvania, 134 U. S. 232;
Ex Parte Young, 209 U. S. 145.
G. H. & S. A. Ry Co. vs. State of Texas, 210 U. S. 227.
Merchants Bank vs. Penn, 167 U. S. 463.

The highest court of the State has construed the law which is assailed, as imposing an occupation tax, and as not being in violation of the State Constitution, and we must accept its construction on these subjects. However this court will, independently of that decision, determine the federal question as to whether or not section nine of the act is repugnant to the Fourteenth Amendment and in doing so will look at the real nature and effect of the tax.

Our point is that a hostile discrimination has been made against wholesale dealers in coal oil and other products refined from petroleum, without any reasonable grounds for singling out wholesale dealers in these articles from all others,—clasing them to themselves, and imposing a tax so oppressive and onerous as to be destructive.

The general principles governing such legislation are clearly laid down. The only difficulty is in the application.

No case more clearly announces the governing principle than G. C. & S. F. Ry Co. vs. Ellis, 165 U. S. 165:

> "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and it is not a mere arbitrary selection."

This principle must apply to all legislation, including the imposition of taxes. That the state legislatures in making any classification for purposes of taxation must

observe this principle is recognized in Bell's Gap Railroad vs. Pennsylvania, 134 U. S., at page 237 in this language:

> "All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State in framing their Constitution. But *clear and hostile discriminations against particular persons and classes*, especially such as are of *unusual character*, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition."

And no exception to the rule exists in the imposition of occupation and license taxes. Cargill vs. Minnesota, 180 U. S. 469, discussing a Minnesota statute imposing a license tax on the owners of elevators and warehouses suiated on the right of way of railroads, recognizes the application of the principle to such legislation, saying on this subject:

> "If in the judgment of the State it was necessary for the public interests, or beneficial to the public, that elevators and warehouses of the kinds described should be operated only under a license and under such regulations as may be rightfully prescribed, it would be going very far to hold that such a classification was so unreasonable as to justify us in adjudging that the requirement of a license was void as denying the equal protection of the laws. No such judgment could be properly rendered unless the classification was merely arbitrary or was devoid of those elements that are inherent in the distinction implied in classification. We cannot perceive that the requirement of a license is not based upon some reasonable ground—some difference that bears a proper relation to the

classification made by the statute. Gulf, Colorado & Santa Fe Ry vs. Ellis, 165 U. S. 150, 165."

In passing on any statute so baleful and destructive in its effects as the one under discussion, the only defense of which is that it is within the legislative *power*, because a proper exercise of the right of *classification*, it is well to bear in mind what this court further said in the Ellis case, (165 U. S. 159), which seems a shield against all such oppressive statutes:

> "But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews speaking for this court, in Yick Wo vs. Hopkins, 118, U. S. 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' The first action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of In-

> dependence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

In determining whether or not a tax imposed violates a federal safeguard, not the *name* of the tax, but its substantial nature and effect will be regarded, and, not that tax alone, but the whole scheme of taxation, will be considered, to ascertain whether or not as a practical question, the persons affected have been denied the protection guaranteed by the federal constitution. G. H. &c. Ry Co. vs. Texas, 210 U. S. 227:

> "We are to look for a practical rather than a logical or philosophical distinction," says that case. Again, same case: "A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can. Neither the State courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect."

The following constitutional provisions will show the kind of taxes authorized under the Constitution of the State of Texas, and the limitations within which the taxing power had to be exercised under that Consitution:

Sec. I, Art. VIII:

> "Taxation shall be equal and uniform. All property in this State, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law. The Legislature may impose a poll tax. It may also impose occupation taxes, both upon natural persons and upon corporations, other than muni-

cipal, doing any business in this State. It may also tax incomes of both natural persons and corporations, other than municipal, except that persons engaged in mechanical and agricultural pursuits shall never be required to pay an occupation tax; provided, that $250 worth of household and kitchen furniture, belonging to each family in this State, shall be exempt from taxation, and provided further that the occupation tax levied by any county, city or town, for any year, or persons or corporations pursuing any profession or business, shall not exceed one-half of the tax levied by the same period on such profession or business."

Sec. 2, Art. VIII:

"All occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax; but the Legislature may, by general laws, exempt from taxation public property used for public purposes; actual places of religious worship; places of burial not held for private or corporate profit, all buildings used exclusively and owned by persons or associations of persons for school purposes (and the necessary furniture of all schools), and institutions of purely public charity; and all laws exempting poperty from taxation other than the property above mentioned, shall be void."

Sec. 9, Art. VIII:

"The State tax on property, exclusive of the tax necessary to pay the public debt, and of the taxes provided for the benefit of public free schools, shall never exceed thirty-five cents on the one hundred dollars valuation; and no county, city or town shall levy more than twenty-five cents for city or county purposes, and not to exceed fifteen cents, for roads and bridges, on the one hundred

dollars valuation, except for the payment of debts incurred prior to the adoption of this amendment, and for the erection of public buildings, street sewer and other permanent improvements, not to exceed twenty-five cents on the hundred dollars valuation in any one year, and except as is in this Constitution otherwise provided."

Sec. 17, Art. VIII:

"The specification of the objects and subjects of taxation shall not deprive the Legislature of the power to require other subjects or objects to be taxed in such manner as may be consistent with the principles of taxation fixed in this Consitution."

Sec. 18. Art. VIII:

"The Legislature shall provide for equalizing as near as may be, the valuation of all property subject to or rendered for taxation (the County Commissioners' Court to constitute a board of equalization); and may also provide for the classification of all lands with reference to their value in the several counties."

Sec. 4, Art. XI:

"Cities and towns having a population of ten thousand inhabitants or less, may be chartered alone by general law. They may levy, assess and collect an annual tax to defray the current expenses of their local government, but such tax shall never exceed, for any one year, one-fourth of one per cent., and shall be collectible only in current money."

Sec. 5, Art. XI:

"Cities having more than ten thousand inhabitants may have their charters granted or

amended by special act of the Legislature, and may levy, assess and collect such taxes as may be authorized by law, but no tax for any purpose shall ever be lawful, for any one year, which shall exceed two and one-half per cent. of the taxable property of such city."

By an Act of the Twenty-Ninth Legislature, (the same that passed the law under discussion), it was provided: (Sec. 1, Chapter 8, Session Laws, p. 436):

"That there shall be levied and collected, for general revenue purposes, annually for the years 1905 and 1906 and ad valorem tax of twenty cents, and annually thereafter an ad valorem tax of sixteen and two-thirds cents on the one hundred dollars of the cash value thereof, estimated in lawful currency of the United States, on all real property situated and on all property owned in the State on the first day of January in each and every year, and on all property sent out of the State prior to the first day of January for the purpose of evading the payment of the taxes thereon, and afterwards returned to the State, except so much thereof as may be exempted by the Constitution and laws of this State or the United States, which cash value shall be estimated in the manner prescribed by law."

Each county, within constitutional limits, levied and collected for county purposes an advalorem tax on all property in the County on Jan. 1st, subject to taxation.

Every corporation organized in the State, except certain charitable corporations, paid, upon organization a charter fee and a franchise tax, the latter being paid annually thereafter.

The other occupation taxes collectable by law in 1905 were prescribed by Article 5049, as amended by Act of the 25th Legislature, (Subd. 1, Chapter 18, p. 49, Acts

First Called Session 25th Leg.), under which no taxes were imposed on *dealers* other than,

1. Merchants taxed by Sec. 1 according to the amount of their annual purchases, (Rr. 39);

2. Merchants "who may remove from place to place and offer for sale 'bankrupt stocks' of goods, or advertising 'fire sales' or 'water and fire damaged stocks for sale,' for limited period," etc., who were taxed by a graduated scale so much per month. (Subd. 2);

3. "Traveling persons selling patent medicines;" taxed $100 annually. Not applicable to commercial travelers, drummers or salesmen soliciting trade for merchants engaged in the sale of drugs, etc.

4. Persons engaged in discounting or shaving paper, or engaged * * * as *dealers* in stocks, securities or bills of exchange," etc., taxed at $50 per annum. (Subd. 5);

5. Peddlers, the tax on whom was graduated according to whether a foot peddler, a peddler with one, two or more horses, etc. (Subd. 21);

6. Peddlers in clocks, cooking stoves, ranges, wagons, buggies, washing machines, churns, etc., who had to pay annually $250 for the State and $100 in each county where they made sales, (Subd. 40).

7. "Wholesale dealers in cotton seed oil or any of the products of cotton seed, selling such to the trade;" required to pay an annual tax of $25.00; "provided, that the tax shall not apply to a merchant who sells other goods and merchandise and pays an annual occupation tax therefor." (Subd. 59).

8. "Dealers in cigarettes;" taxed $10.00 per annum in addition to the occupation tax levied on merchants, (Subd. 62).

It will be readily perceived that the tax on some of the occupations referred to in the foregoing list, as for instance, dealers in cigarettes; peddlers of stoves, washing machines and churns; and vendors patent medicines, was imposed on the occupations, as quasi nuisances, and the classifications justified on the ground that the taxes prevented or restrained frauds or trades injurious to health and therefore was a legitimate exercise of the police power of the State.

Those dealers following useful, legitimate, and honest occupations, whose business could be considered as analogous to that of dealers in coal oil, naptha, etc., and not reasonably subject to a repressive tax imposed in the exercise of the police power of the State, are described in subdivisions 1 and 59 of Article 5049.

Therefore, it is proper to compare the taxes imposed by those subdivisions with that imposed by the statutes under discussion.

Besides, the last section of the act in question shows it to have been passed for purpose of raising revenue for the State, and not as a police regulation. (R. 39).

Subdivision 1, dealing with merchants generally, imposes a flat annual occupation tax ranging from 1-10 to 1-125 part of that imposed by Sec. 9 of the "Kenndey Law," graded and based on theamount of annual purchases; while the "Kennedy Law" imposes a 2 per cent tax on the gross receipts from sales, or on the value of all refined oil or products of petroleum received, possessed or handled during the quarter, whether sold or not.

Granting that a merchant's sales would at least equal his purchases during the year, we find that a "merchant" selling coal, and any of its refined products, or sugar, bacon, dry goods, or other articles, to the amount of $9,999 per year, would pay $12, as against $199.98 (over 18 times as much), paid by a merchant in coal oil, etc., selling the sameamount; if

the former's annual sales were $14,999, his tax would be $125, as against 2,999.98 to be paid by the latter on like sales; or the latter would pay about 24 times the tax of the former; if the former's annual sales were $1,000,000, his tax would be $300, as aganist $20,000.00 (over 66 times as much), to be paid by the latter on like sales.

Subdivision 59 imposes an annual occupation tax on wholesale dealers in cotton seed oil or any of the products of cotton seed of $25.00.

If a wholesale dealer in cotton seed oil and the products of cotton seed handled, in one year, $150,000 worth of products, his annual tax would be only $25, as against $3,000 to be paid by the wholesale dealer in coal oil and the products of petroleum for handling a like amount; the latter being 120 times the former;—or a fair annual profit on a business of that magnitude.

Another comparison: if a wholesale dealer in coal (a fuel, like oil, and a competitive fuel at that), or its products, (many very similar to those produced from petroleum), did an annual business of $150,000, he would, under the laws of this state, existing at the time and since, pay no occupation tax whatever, unless he conducted his business in a manner so as to come within the meaning of the term "merchant;" while the wholesale dealer in the competitive articles of coal oil, naptha, etc., would have to pay $3,000. If the dealer in coal ran his business so as to fall within the definition of the term "merchant," even in that case his tax, if his annual purchases were equal to $150,000, would be only 1-24 of that of his competitor,—the wholesale dealer in coal oil, etc., for selling or receiving a like amount. Inaddition to this, under this same Kennedy law (Sec. 13), the crude oil, as it came from the ground, would bear a one per cent tax against its gross value, in the guise of an occupation tax against the producer; and a 2 per cent tax on the gross charges for trans-

porting the oil through pipe lines (Sec. 12);—all in addition to the ad valorem tax; while coal and its products, or the dealers in them, unless merchants, would bear no tax but the ad valorem.

The constitutional limit on the State ad valorem tax is 35 cents on the $100 of value; the State ad valorem, as fixed by the statute for the years 1905 and 1906,—(the time involved)—was only 20 cents on $100. (Laws 29th Leg., 436.) This tax under discussion,—(which we must call an "occupation tax," because the courts of Texas have so decided, but at the substancce of which this court will look in determining whether or not a hostile and rabitrary discrimination has been made),—is itself two per cent on the gross receipts or value, that is nearly six times the constiutional limit of the State ad valorem tax, and ten times the amount of ad valorem tax actually fixed by statute for that year. In addition to all this, it must be borne in mind that every acre of oil land, every barrel of oil, refined or crude, on hand the first of January, bore its ad valorem tax, state, county and municipal, just as all other property, and this very act by Section 13 fixed another tax,—"occupation," so called,—on the producers, which levied a further tribute of one per cent on the gross value of all the oil as it came from the wells,—itself nearly three times the constiutionl limit for state ad valorem taxes, and five times that fixed by the statute on other property.

It will doubtless be said that a state may levy and collect an occupation tax in addition to an ad valorem tax; or taxes on several different occupations, though they all involve handling the same property. While this istrue, the court will nevertheless scan the whole scheme of taxation to discover whether or not there has been a hostile discrimination,—a classification purely arbitrary, without any just and reasonable grounds for its existence. While a legislature may impose heavy

burdens of taxation, it must do so with an even hand, or else "that equal protection of the law" guaranteed by the Fourteenth Amendment will be denied. That a tax is oppressive does not *per se* make it unconstitutional, but it is a feature exciting and requiring the closest scrutiny, in determining whether or not imposed in a reckless disregard of constitutional guaranties.

It was not necessary to prove the other tax laws of Texas referred to, or a matter of common knowledge,—as that coal is produced and dealt in extensively in Texas, as in most other states in the Union. They are matters of which the courts will take judicial notice. These discriminations may, therefore, be said to inhere in the very *terms of the law,* and do not arise merely out of the manner in which the law is executed; and in such cases the courts draw a distinction, declaring a law void that, by its terms, makes an arbitrary classification and hostile discrimination, while refusing to do so, if the hostile discrimination merely arises out of the enforcement of the law. (Bank vs. Penn., 167 U. S., 463).

It must be borne in mind that Section 9 in effect, if not in name, imposes a tax of 2 per cent on the gross receipts from sales of the property itself, or on its gross value; it is subbstantially a tax on the *corpus,* not on the rents or charges from use or operation, as on the rents of a house or the revenues of a railway. An industrious man, content with small profits on each sale, but desiring to increase his profits by pushing his business to a large volume, would meet with the heaviest punishment. Let us suppose he had $100,000 employed in his business. Such a man might be expected, in the course of a year, to turn it over five times; that is, to do an annual business amounting to $500,000. This tax alone on such business would amount to $10,000, that is *ten per cent* on his invested capital—a magnifi-

cent profit. Besides this he would have to pay his ad valorem and all other taxes. Further, some United States bonds bear only 2 per cent interest, while three and four per cent bonds are much sought after.

From such comparisons we are brought to a realization of the enormity of this tax. That there is a *hostile discrimination* there can be no question. The only question left is whether there is a just and reasonable difference between the occupation of the wholesale dealer in coal oil, naptha, etc., and the wholesale dealer in other articles, as coal, iron, bacon, etc., that gives in law a basis, other than a purely arbitrary one, for the classification,—or more accurately speaking the hostile discrimination.

Seeing that there is a palpable discrimination against wholesale dealers in coal oil, etc., it follows that the material and crucial inquiry is this: Was there any just and reasonable grounds for the classification made? It is to be supposed that if any such existed they would have been suggested by counsel for the State, or the courts upholding the law.

The only reason for the classification that we have heard from opposing counsel is that this statute and the other sections in the Kennedy Act touching the oil industry grew out of the idea that the "oil business" was not bearing its just share of taxes.

This must mean that the persons and corporations engaged in the oil business were either evading existing laws applicable to others, or that they should pay heavier taxes than others. If the former, the remedy was the enforcement of existing law, or the passage of additional laws requiring the payment of a just and equal share of taxes. Besides it occurs to us that even an evasion of existing law by some or many persons dealing in an article affords no proper and just grounds for placing all dealers in that article into a class by themselves, and subjecting them to a destructive tax. Fur-

ther, it is not believed that the court will assume, without a word of proof, that the dealers in oil are worse, on an average, than the dealers in wheat, molasses, bacon and coal, and support an oppressive law on any such asumption. They had the same facilities for evasion as others, no more; and it is not to be assumed that they did evade more.

Then can the law be justified upon the assumption that it might be proper for wholesale dealers in refined oil, etc., to be required to pay more than wholesale dealers in other articles? If so, why?

Certainly, not upon the ground that it is a proper exercise of the police power of the State. Oil and its products are useful articles, highly necessary to the commerce and welfare of the country, and the man who, at a great risk and frequent loss, bores in the ground for it, or refines it, adds to the wealth and prosperity of mankind and society. He is not an enemy or a nuisance. No proof is required on this subject. This is a matter of common knowledge of which the court will take judicial notice.

Then can the tax on dealers be justified upon the ground that it is necessary to impose this heavy tax and create this class unto itself, in order to *reach* the property, or secure a just and equal tribute? It can not be perceived that the dealer in coil oil, naptha, benzine, etc., has any more facility or inclination to escape than the dealers in coal itself, cotton seed oil, sugar, bacon, or other commodities.

If it be urged that the oil is taken rapidly from the ground and disposed of in various quarters of the world, to this it may be replied, that the same is true of coal, silver, gold, iron and all minerals, besides thousands of vegetable prouets that go into commerce. Furthermore, it may be said with reference to oil, that when land is, by the enterprise and daring of the "wild catter," proven to be oil land, its value enhances at once

sometimes one hundred, sometimes one thousand, and sometimes ten thousand fold, as is well known, and the land is taxed for years frequently at this enhanced value; and, moreover, by Section 13 of this very "Kennedy Law," every barrel of oil pays its one per cent tribute upon reaching the surface.

So, not only are there no greater chances of escape from taxation, but, in fact, oil and the dealers in it, by the other provisions of the law, pay a higher tribute to the government than any other species of property in this state. And while it may be said that the oil is sometimes taken rapidly from the ground, (as are other minerals), and thus, in a sense, the value of the Texas lands reduced, yet the *dealer* remains; further, the tax imposed by Section 9 is not limited to the wholesale dealer in Texas oil, extracted from Texas soil, but its heavy hand is laid on the dealer that buys a car load from Kansas, Oklahoma or Louisiana; while his brother wholesale dealer across the street may buy and sell tons of coal, a rival fuel, and its refined products, and go scot free.

But it is suggested by the learned Justice who wrote the opinion of the Supreme Court, (Texas Co. vs. Stephens, 103 S. W., 483), that a justification for this classification may be found in the difference of profits and the volume and distribution of business. If it be conceded that, where necessary to support the legislative classification, (if such can be a justification), it will be presumed that the volume of business and profits are greater than usual, still we submit that the magnitude of a business and the profits derived will not alone justify a classification otherwise arbitrary. (Cotting vs. Kansas City &c Yards Co., 183 U. S., 104).

The following language from the Cotting case is pertinent:

> "The question thus presented is of profoundest significance. Is it true that in this country

that one, who by his attention to business, by his efforts to satisfy customers, by his sagacity in discerning the probable courses of trade, and by contributing of his means to bring trade into those lines, succeeds in building up a large and profitable business, he becomes thereby a legitimate object of the legislative scalping knife? Having created the facilities which the many enjoy, can the many turn around and say, you are making too much out of those facilities, and you must divide with us your profits? * * * * *

"Now, shall they whose interests are all along the line of production, having by virtue of their numerical majority the control of legislation, be permitted to say to one who acts as an intermediary between transportation and sale, that while we permit no interference with the prices which we put upon our products, nevertheless we cut down your charges for intermediate services; and this not because any particular charge is unreasonable, but because you are making by the aggregate of those charges too large a sum, and ought therefore to divide with us. The possibility of such legislation suggests the warning words of Judge Catron, afterwards Mr. Justice Catron of this court, when in Vanzant vs. Waddel, 2 Yerger, 260, 270, he said:

"Every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community who made the law, by another."

"The Fourteenth Amendment forbids any

State to 'deny any person within its jurisdiction the equal protection of the laws.'"

So it is not conceivable that the volume of business or extent of profits in a certain article can alone be a reasonable basis of a classification that singles out those dealers from all others and burdens them with a hostile and destructive discrimination, even though it bears the name of an "*occupation tax.*" Can it be that a Legislature has power to say that the dealers in a certain article shall be taxed from ten to one hundred fold more than dealers in another similar article, for the reason alone that such business sometimes reaches large volumes and becomes profitable? Furthermore it must be borne in mind that this tax on wholesale dealers is not limited to those who have a large and profitable business, but strikes alike the dealer whose business and profits are small and the one, whose business and profits are large. Then does the *nature* of the article justify the discrimination? If so, we should be able to point out the *peculiarity*. What is it? Certainly, one finds himself at a loss to name it. In truth, the article like the business but adds to, rather than subtracts from, the things that are desirable.

Can it be the *manner* of conducting the business justifies such tax or affords the "*just and reasonable difference*" that constitutes a proper basis for classification? The wholesale dealer in refined oils does not carry on his business either in a dangerous or offensive way, nor is he a menace to society, or an "undesirable citizen."

We return then, to the question: Why should this enormous tax of two per cent. be exacted on this class of wholesale dealers alone? It must be borne in mind, furthermore, that not only the two per cent. levied against the gross receipts and value of the *refined* oil, but every gallon of *crude* oil, standing at the base of the business, is taxed

by another section of the law one per cent. additional on its gross value; though this very crude oil, formerly concealed in the bowels of the earth, is only brought within reach by the daring and enterprise of the prospector, who drills, at great expense, hundreds of feet under the ground, with the chances 100 to 1 against him, and if he discovers oil he adds that much to the wealth of the state, out of which the entire public reaps a benefit, and by which the taxable values are increased. If he fails, he alone suffers.

We cannot conceive, therefore, that there is anything in the *nature* of the article, or manner in which the business is conducted, the volume of business, or extent of profits, to justify the classification.

It may be said that this statute imposing a tax on "wholesale dealers," as construed by our courts, reaches the *manufacturer* of oils, while the other laws imposing occupation taxes do not, and that this affords the "reasonable grounds of difference"—but to this suggestion it may be answered:

1st. That the statute does not stop with those "wholesale dealers" who are manufacturers; but reaches all, including mere merchants in oil; and

2nd. That the laws of Texas impose no occupation taxes on other manufacturers; and why this distinction against manufacturers of refined oil, etc?

It cannot be said that a legislature's power of classification can extend to each separate article of commerce, without other distinguishing grounds. If so, the State could levy one tax on dealers in potatoes; another on dealers in turnips; another on dealers in cotton goods; another on dealers in woolens; another on dealers in silks; and so on *ad infinitum*. They are all mere dealers or merchants, and should be taxed alike, unless there is a real difference upon some natural basis.

If a classification is made, the basis of such classification must be natural, not arbitrary. (Ry. vs. Ellis,

16 U. S., 156). Is it natural,—rather, is it not the *essence of despotic* and *arbitrary* power to tax a dealer in oil products two per cent on his gross receipts, or value, while the tax on dealers in other articles of commerce, (some similar and competitive at that), is nothing or comparatively insignificant, *unless some other reason can be ascribed than the mere fact it is oil he is handling?* Instinctively,we ask for a better, a natural reason,—"a difference which bears a reasonable and just relation to the act in respect of which the classification is proposed."

We search for such a difference in vain, and at last are driven back upon the humiliating conviction that this legislation, unparalleled in its enormity, confiscatory in its effect, finds its only reason in some deep-rooted, universal prejudice against certain wholesale dealers in oil,—a feeling so prevalent as to be almost current history.

We conclude this branch of the discussion with the following apt language from the Ellis case (165 U. S.):

> "While good faith and a knowledge of existing conditions on the part of a legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation, is to make the protecting clause of the Fourteenth Amendment a mere rope of sand, in no manner restraining state action."

Up to this point we have said nothing about the penalties prescribed by the Act, which are so severe as practically to bar resort to the courts.

The trial court and the court of civil appeals in the case of Texas Co. vs. Stephens, 99 S. W., 161, held that the penalties prescribed by Sections 9 and 13 were void and unenforceable. However, the question of the va-

lidity of the provision for penalties was not presented to the Supreme Court in the Texas Company case, or any other case in a way requiring a decision; that court saying in the Texas Company case, 103 S. W., 485, this:

> "The attack upon the statute because of the severity of the measures authorized for its enforcement and of the penalties prescribed is met by the fact that the question as to their validity is not involved. None of them were enforced in this case, and we think it quite clear that they do not affect the right of the state to collect the taxes themselves, which is all that is now before us."

The Supreme Court up to this time has merely held that Section 9, insofar as it imposes an occupation tax, is valid, and that the provision for the tax may be enforced, even though the provisions for the penalties may fall.

If in the present status of the decisions, the provision for penalties may be considered by this court as a part of Section 9, in view of the fact that the highest court of the State has held Section 9 to be valid as a taxing measure, it is plain that on the authority of the Cotting case, 183 U. S., and of the more recent case of *Ex Parte Young*, 209 *U. S.*, the statute must be held void as being repugnant to the Fourteenth Amendment, on account of the provisions for penalties, if for no other reason. The act provides:

> "Should any person, association of persons, or corporation, or the officers or agents of any such corporation, person or association of persons herein named, fail to make the report herein provided for, and pay said taxes, for thirty days after the termination of any quarter of the year, then he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than fifty nor more than one hundred

dollars. *Each and every day after said thirty days shall have expired shall be deemed a separate offense.* In addition thereto, in the event of the failure of the officers or agents of any such company or corporation to make the reports and pay said taxes, for thirty days after the termination of any quarter of the year, each and every such company or corporation, or their officers or agents, so failing, shall forfeit and pay to the State the sum of twenty-five dollars *for each day said report and payments are delayed.*"

No such penalties are prescribed for other similar violations. (Art. 112, Penal Code; R., 40 and 41).

If a dealer engaged in the business taxed by Section 9 desired to contest the law, in all probability his suit would be in the State courts 12 months before he could hope to reach, in the ordinary course of events, a final decision of the state courts; and it would probably be two years before he might hope to obtain a decision of the Supreme Court of the United States. So, if he failed, he would be subjected to about 700 penalties of $25.00 each, and as many prosecutions in any of the justice courts of Travis County, in each of which he might be dragged hundreds of miles away from home and fined from $50 to $100, which would mean ruin to any ordinary person.

If he paid the tax that would likewise spell ruin. Under such conditions, it is mockery to say that the courts are open for redress.

The language of the Cotting case, (183 U. S., pp. 100, 102), quoted with approval in the Young case, (209 U. S., 146), is peculiarly applicabble:

> "Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim of defense subject to the condition that upon a failure to make good that

> claim or defense the penalty for such failure either appropriates all his property or subjects him to extravagent and unreasonable loss?"

Again at page 102:

> "It is doubtless true that the State may impose penalties, such as will tend to compel obedience to its mandates by all, individuals or corporations, and if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different from that here presented. But when the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws."

If, in the present state of the decisions, the court will not consider provision for the penalties as a necessary part of Section 9, the whole to stand or fall together, still we may ask that it be considered as manifesting a clear spirit of hostile discrimination.

Believing that Section 9 denies to wholesale dealers in refined oils the equal protection of the law, and that it is therefore void, the plaintiff in error prays that the judgment of the State courts be reversed, and that the State be denied any recovery, and for general relief.

Respectfully submitted,

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Of Counsel.

301-1209-100.

No. 697.

SUPREME COURT OF THE UNITED STATES.

October Term, 1906.

SOUTHWESTERN OIL COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

BRIEF FOR THE STATE OF TEXAS, DEFENDANT IN ERROR.

This was an action brought in the district court of Travis County, Texas, by the State of Texas, defendant in error, against the Southwestern Oil Company, plaintiff in error, to recover certain taxes claimed to be due by it under Section 9 of what is known as the Kennedy Tax Law, it being Chapter No. 148 of the General Laws of the Twenty-ninth Legislature of the State of Texas (Chapter 148, Acts 1905). The State recovered judgment for a part of the taxes claimed, amounting in the aggregate to $1,129.51, and judgment went against the State as to certain items of taxes claimed in the petition.

The Southwestern Oil Company appealed from the judgment of the trial court to the Court of Civil Appeals of the Third Judicial District of Texas, which court, in all things, affirmed the judgment of the court below. The case was then taken to the Supreme Court of Texas on application for writ of error, and that court, on June 16, 1907, rendered an opinion and judgment, affirming the judgment of the trial court and of the Court of Civil Appeals, and the case is now before this court upon writ of error granted by the Chief Justice of the Supreme Court of Texas.

There is no controversy about the facts. Plaintiff in error admits that it is liable if the statute under which the

taxes are demandable is constitutional. It asserts, however, and attempts to maintain by authority and argument:

1. That the statute is violative of the Fourteenth Amendment of the Constitution of the United States prohibiting the State from depriving any person of life, liberty or property without due process of law or from denying any person within its jurisdiction the equal protection of the laws, in that it discriminates between wholesale dealers in coal oil, naphtha, benzine and other mineral oils and others pursuing occupations which belong to the same class in imposing heavier taxes upon such dealers than are imposed upon them;

2. That the statute is void as being repugnant to the Fourteenth Amendment on account of the provision for penalties which are claimed to be heavier than are imposed for violations of other tax laws, and so severe as to practically bar resort to the courts; and

3. That the statute under investigation violates Article 1, Section 4 of the Constitution of the United States because it attempts to lay a tax or embargo on interstate and foreign commerce.

We will discuss these questions in the order in which they have been stated. In view of the fact, however, that plaintiff in error does not seem willing to be bound by the conclusions of the Supreme Court of Texas as to the nature and character of the tax in controversy, we believe at the threshold of a consideration of this case there lies logically an inquiry as to the nature and character of the tax prescribed by said statute and the subject of the tax and that such inquiry should precede a discussion, in order, of the principal issues involved; and this conclusion is confirmed by the following quotations from plaintiff in error's brief:

> "The constitutional limit on the State ad valorem tax is 35 cents on the $100 of value; the State ad valorem, as fixed by the statute for the years 1905 and 1906 (the time involved), was only 20 cents on $100. (Laws 29th Leg., 436.) This tax under discussion (which we must call an 'occupation tax,' because the courts of Texas have so decided, but at the substance of which this court will look in determining whether or not a hostile and arbitrary discrimination has been made), is itself two per cent on the gross receipts or value, that is nearly six times the constitutional limit of the State ad valorem tax, and ten times the amount of ad valorem tax actually fixed by statute for that year. In addition to all this, it must be borne in mind that every acre of oil land, every barrel of oil, refined or crude, on hand the first of January,

bore its ad valorem tax, State, county and municipal, just as all other property, and this very act by Section 13 fixed another tax—'occupation,' so-called—on the producers, which levied a further tribute of one per cent on the gross value of all the oil as it came from the wells—itself nearly three times the constitutional limit for State ad valorem taxes, and five times that fixed by the statute on other property. * * *

"It must be borne in mind that Section 9 in effect, if not in name, imposes a tax of 2 per cent on the gross receipts from sales of the property itself, or on its gross value; it is substantially a tax on the *corpus*, not on the rents or charges from use or operation, as on the rents of a house or the revenues of a railway. An industrious man, content with small profits on each sale, but desiring to increase his profits by pushing his business to a large volume, would meet with the heaviest punishment. Let us suppose he had $100,000 employed in his business. Such a man might be expected, in the course of a year, to turn it over five times; that is, to do an annual business amounting to $500,000. This tax alone on such business would amount to $10,000; that is *ten per cent* on his invested capital—a magnificent profit. Besides this he would have to pay his ad valorem and all other taxes. Further, some United States bonds bear only 2 per cent interest, while 3 and 4 per cent bonds are much sought after."

None of the questions raised on this appeal were discussed by the Supreme Court of Texas in its opinion in this case, such questions having been passed upon by that court in the case of Texas Company vs. Stephens et al. (100 Texas, 628). The opinion in this case merely referred to the opinion in that case for a discussion of such questions, and we will, therefore, refer to the Texas Company case for the holding of the Supreme Court upon the questions involved in the case at bar.

THE TAX PRESCRIBED BY SECTION 9, OF CHAPTER 148, OF THE ACTS OF THE TWENTY-NINTH LEGISLATURE OF TEXAS IS NOT AN *AD VALOREM* OR PROPERTY TAX, BUT AN OCCUPATION TAX.

AUTHORITIES.

The Texas Co. vs. Stephens, 100 Texas, 644
Producers Oil Co. vs. Stephens, 99 S. W., 157.
Pullman Palace Car Co. vs. State, 64 Texas, 274.
State vs. Stephens, 4 Texas, 137.
Languille vs. State, 4 Texas Ct. Appeals, 322.
Cooley on Taxation, 3rd Ed., p. 31.
Horn Silver Mining Co. vs. New York, 143 U. S., 313.

Maine vs. Grand Trunk R. R. Co., 142 U. S., 227.
N. Y. Central Ry. Co. vs. Miller, 202 U. S., 596.
Kehrer vs. Stuart, 197 U. S., 69.
Osborne vs. Florida, 164 U. S., 560.
Turner vs. Wilkes, 173 U. S., 461.
Gatewood vs. North Carolina, 203 U. S., 541.
Armour Packing Co. vs. Lacey, 200 U. S., 226.
Smiley vs. Kansas, 196 U. S., 447.

The Twenty-ninth Legislature of the State of Texas passed an Act approved April 17, 1905, under the ninth section of which the State claimed the taxes out of which this controversy arose. The section referred to reads as follows:

"Each and every person, association of persons or corporation created by the laws of this or any other State or nation, which shall engage in their own name, or in the name of others, or in the name of their representatives or agents, in this State, in the wholesale business of coal oil, naphtha, benzine or any other mineral oils refined from petroleum, and any and all mineral oils, shall pay an annual tax of two per cent upon their gross receipts from any and all sales in this State of any of said articles in Section 9 of this act hereinbefore mentioned, and an annual tax of two per cent of the cash market value of any and all of said articles that may be received or possessed or handled or disposed of in any manner other than by sale in this State; and it is hereby expressly provided that delivery to or possession by any person, association of persons or corporation in this State of any of the articles hereinabove mentioned in Section 9 of this act, from whatever source the same may have been received, shall for the purpose of this act be held and considered such a sale and such ownership and possession of such articles and property (where no sale is made) as will and shall subject the same to the tax herein provided for. Said tax herein provided for shall be paid to the State Treasurer quarterly, and every such person, agent, association of persons, or corporation so owning, controlling or managing such business shall, on or before the first day of April, and quarterly thereafter, report to the Comptroller under oath of the president, treasurer, superintendent or some other officer of said corporation or association, or some duly authorized agent thereof, the amount received by them from such business in this State. Should any person, association of persons or corporation, or the officers or agents of any such corporation, person or association of persons herein named, fail to make the report herein provided for, and pay taxes for thirty days after the termination of any quarter of the year, then he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than fifty nor more than one hundred dollars. Each and every day after said thirty

days have expired shall be deemed a separate offense. In addition thereto, in the event of the failure of the officers or agents of any such company or corporation to make the reports and pay said taxes, for thirty days after the termination of any quarter of the year, each and every company or corporation, or their officers or agents so failing, shall forfeit and pay to the State the sum of twenty-five dollars for each day said report and payment are delayed; which forfeiture and taxes shall be sued for by the Attorney General in the name of the State. For the purpose of suits and prosecutions provided for in this article, venue and jurisdiction are hereby expressly conferred upon the courts of Travis county, and service may be had upon any officer or agent of such company or corporation in the State, and such service shall in all respects be held legal and valid. The tax herein levied shall be in addition to all other taxes levied by law."

It is true that the act prescribing this tax does not denominate it an occupation tax, but we believe that an application to it of the well established principles upon which taxation is based and a comparison of the act with other statutes, which have always been recognized in Texas by all of the departments of government, and generally throughout the United States, as occupation tax laws, will necessarily lead to the conclusion that this is an occupation tax.

As illustrating the general rule, we refer to the following cases:

Pullman Palace Car Company vs. State, 64 Texas, 274.

This case arose under the Act of March 4, 1881, which imposed on "every person, firm or association of persons owning or running palace, sleeping or dining cars not owned by the railroad company in this State," an annual tax of $2.00 per mile, etc.

The Supreme Court of Texas, in an opinion by Associate Justice Stayton, said:

> "The tax contemplated by this part of the act is not a tax upon the property, which, under the Constitution, must be taken in proportion to its value, nor is it a tax upon persons which must be uniform. It is a tax imposed upon a named business, which may be carried on by natural persons or by corporation within this State, on property belonging to others; and such as is designated in the Constitution as 'occupation taxes.'"

The case of State vs. Stephens, 4 Texas, 137, arose under Chapter 122, page 151, of the Acts of 1848, the act being entitled "An Act to raise revenue by taxation," and provided, among other things, "that each and every person

occupied in sale of goods, wares, merchandise, vinous and spirituous liquors, when sold in quantities of a quart or more, shall pay a tax of twenty cents on each $100.00 value of such goods," etc., and further, providing "that the taxes assessed pursuant to this act shall be a lien upon all property, real and personal, belonging to the person or persons so assessed, and upon whom the same is imposed. * * *"

In this case the statute did not designate the taxes an occupation tax. Nevertheless, the Supreme Court of Texas upheld the tax as an occupation tax, saying, "there can be no doubt that the quarterly return could be legally required from the defendant as an occupation tax, if he was engaged in buying and selling merchandise, or receiving the same for sale as an agent or auctioneer."

Languille vs. State, 4 Texas Court of Appeals Reports, 322.

In this case the Court of Appeals quoting from Cooley on Taxation, says:

> "A tax on the privilege of carrying on a business or employment will commonly be imposed in the form of an excise tax on the license to pursue the employment; and this may be a specific sum or a sum whose amount is regulated by the business done, or income of profits earned. Sometimes small license fees are required mainly for the purpose of regulation, but, in other cases, substantial taxes are demanded, because the persons upon whom they are laid would otherwise escape taxation in the main if not entirely." (Cooley on Taxation, 3d Ed., p. 31.)

Again quoting from the same authority, said opinion continues:

> "The methods in which persons shall be taxed are also in the legislative discretion. The taxes which are the most customary are, first, on the privilege of carrying on the business; second, on the amount of business done; third, on the gross profits of the business; fourth, on the net profits, or profits divided. But the tax may be measured by other standards prescribed for the purpose, as well as these. * * * A tax on the privilege of following any particular employment is usually confined to those which in some particular are exceptional, either because they are supposed to be specially profitable or because they required special regulations, or because the privilege is in the nature of a franchise, or because they supply a demand so that the burden they impose will be generally distributed. But no employment is absolutely exempt from the liability to be taxed. The necessities of the government may require that the lowest employment, as well as the most lucrative, shall contribute to its support, and if any is exempt, motives of policy will govern the discrimination."

In the case of Horn Silver Mining Company vs. New York, 143 U. S., 313, this court said:

"The granting of the rights and privileges which constitute the franchises of a corporation, being a matter resting entirely within the control of the Legislature to be exercised in its good pleasure, it may be accompanied with any such conditions as the Legislature may deem most suitable to the public interest and policy. It may impose as a condition of a grant, as well, also, of its continued exercise, the payment of a specific sum to the State each year, or a portion of the profits or *gross receipts of the corporation*, and may prescribe such mode in which the same shall be ascertained, as may be deemed convenient and just. There is no constitutional inhibition against the Legislature adopting any mode to arrive at the same, which it will exact as a condition of the creation of the corporation, or of its continued existence. There can be, therefore, no possible objection to the validity of the tax prescribed by the statute of New York, so far as it relates to its own corporations. Nor can there be any greater objection to a similar tax upon a foreign corporation doing business by its permission within the State. * * * This doctrine has been so frequently declared by this court that it must be deemed no longer a matter of discussion if any question can ever be considered at rest."

In Maine vs. Grand Trunk Railway Company, 142 U. S., 227, this court used the following language:

"The tax, for the collection of which this action is brought, is an excise tax upon the defendant corporation for the privilege of exercising its franchise within the State of Maine. It is so declared in the statute which imposes it; and that a tax of this character is within the power of a State to levy, there can be no question. The designation does not always indicate merely an inland imposition, or duty on the consumption of commodities, but often denotes an impost for a license to pursue certain callings, or to deal in special commodities, or to exercise particular franchises. It is used more frequently, in this country, in the latter sense than in any other. The privilege of exercising the franchises of a corporation within a State is generally one of value, and often of great value, and the subject of an earnest contention.

"It is natural, therefore, that the corporation should be made to bear some portions of the burdens of government. As the granting of the privilege rests entirely in the discretion of the State, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the State in its judgment may deem most conducive to its interests of policy. It may require the payment into its treasury each year of a specific sum, or may apportion the amount exacted according to the value of the business permitted as disclosed by its gains or receipts of the present or past years. The character of the tax or its validity is not determined by the mode adopted in

fixing its amount for any specific period or the times of its payment. The whole field of inquiry into the extent of revenue from sources at the command of the corporation is open to the consideration of the State in determining what may be justly exacted for the privilege. The rule of apportioning the charge to the receipts of the business would seem to be eminently reasonable, and likely to produce the most satisfactory results, both to the State and the corporation taxed."

The statute complained of operates upon individuals, associations of individuals and corporations, and they are the subjects of the tax. All persons, natural or artificial, coming within the designated class, become subject to the tax.

The Constitution of Texas places no restriction whatever upon the power of the Legislature to levy an occupation tax upon both individuals and corporations doing business in the State, except that it requires that all occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax. The Legislature of Texas had a perfect right to require those engaged in the wholesale business of coal oil, naphtha, etc., to pay not only an ad valorem tax, but also a tax for the privilege of the continued exercise of their franchise to do business in the State, or, in other words, an occupation tax.

THE LEGISLATURES OF TEXAS HAVE ALWAYS TREATED, CLASSIFIED AND CONSTRUED GROSS RECEIPTS TAXES AS OCCUPATION TAXES.

Article 7, Section 27, Constitution of Texas, 1845.
Article 7, Section 27, Constitution of Texas, 1861.
Article 7, Section 27, Constitution of Texas, 1866.
Article 7, Section 27, Constitution of Texas, 1869.
Article 8, Sections 1 and 2, Constitution of Texas, 1876.
Acts Called Session Twelfth Legislature, 1870, p. 199.
Acts Sixteenth Legislature, 1879, p. 143.
Acts Seventeenth Legislature, General Laws 1881, p. 58.
Acts Twenty-first Legislature, General Laws 1889, p. 28.
Acts Twenty-third Legislature, General Laws 1893, p. 156.
Revised Statutes 1895, pp. 1019, 1075.
Acts Twenty-fifth Legislature, General Laws 1897, pp. 140, 170.
Acts Twenty-ninth Legislature, General Laws 1905, pp. 347, 427, 336 and 358.
Acts Thirtieth Legislature, General Laws 1907, pp. 479-489.

An occupation tax measured by gross receipts tax is merely one phase of the development of occupation taxes under our State Constitution. A brief consideration of this development will reveal its true character.

The occupation tax clause of our first State Constitution, Article 7, Section 27, Constitution of 1845, was as follows:

> "The Legislature shall have power to lay an income tax, and to tax all persons pursuing an occupation, trade or profession; provided, the term occupation shall not be construed to apply to pursuits either agricultural or mechanical."

The same provision was adopted in the Constitutions of 1861, 1866, and 1869, unchanged, except that in the Constitution of 1869 the word "lay" was changed to "levy." Our present Constitution embraces the same principles, with the important change that corporations, *eo nomine*, are added.

Article 8, Constitution of Texas of 1876, provides as follows:

> "Section 1. * * * The Legislature may impose a poll tax; it may also impose occupation taxes, both upon natural persons and upon corporations, other than municipal, doing business in this State. * * *
>
> "Section 2. All occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax. * * *"

Under the above constitutional declaration our system of occupation taxes has expanded and developed from ten subjects classified and taxed by the First Legislature in 1846, to nearly one hundred subjects included in Articles 5049 and 5243i of the Revised Statutes of 1895, and the General Laws of 1905, and others were added by the General Laws of 1907, pages 479-489. The first gross receipts tax was levied under the Constitution of 1869. An act of the Called Session of the Twelfth Legislature, approved August 15, 1870, page 199, General Laws 1869-70 and 71, levied a tax of two per per cent upon the gross receipts of railroads, insurance and telegraph companies.

As further illustrating the development of gross receipts taxes in Texas, treated by the Legislature as occupation taxes, and classified by it as such, we submit the following history of gross receipts tax legislation in Texas:

GROSS RECEIPTS OCCUPATION TAXES HAVE BEEN LEVIED IN TEXAS AS FOLLOWS:

1870.

Railroads, insurance and telegraph companies, 2 per cent annually. (Called Session, Twelfth Legislature, Acts 1869-70-71, p. 199.)

1879.

Railroads, steamboats and stage coaches, 1 per cent quarterly on passenger travel. (General Laws 1879, p. 143.)

1881.

Same provisions re-enacted. (General Laws 1881, p. 58.)

1889.

Same provisions re-enacted. (General Laws 1889, p. 28.)

1893.

Railroads, steamboats and stage coaches, 1 per cent quarterly, as above.

Life insurance companies 1¼ per cent.

Life and accident insurance companies, 1¼ per cent.

Fire, marine, health, live stock guarantee, or accident insurance companies, one-half of 1 per cent. (General Laws 1893, p. 156.)

1895.

Revised Statutes adopted in 1895 included under Articles 5049 and 5243e the same subjects as in General Laws 1893.

1897.

Railroads, steamboats and stage coaches, 1 per cent. quarterly on passenger travel. (Revised Statutes, Art. 5049, Subdiv. 42.)

Life insurance companies, 2 per cent. gross premium receipts.

Life and accident insurance companies, 2 per cent.

Fire insurance companies, one-half of 1 per cent.

Marine, health, live stock, guarantee, or accident insurance companies, 1 per cent. (Art. 5243e, Revised Statutes, 1895.)

Sleeping, palace and dining car companies, 2½ per cent. (General Laws, 1897, page 170.)

1905.

Railroads, 1 per cent. annually. (General Laws, 1905, page 336.)

Steamboats and stage coaches, 1 per cent. quarterly on passenger travel. (Revised Statutes, Art. 5049, Subdiv. 42.)

Express companies, 2½ per cent. annually.

Sleeping, palace and dining car companies, 4 per cent. annually.

Telegraph companies, 3 per cent. annually.

Telephone companies, 1½ per cent. quarterly.

Surety and guaranty companies, 2 per cent. annually.

Commercial agencies, one-half of 1 per cent. annually.

Gas, electric light, power plants and waterworks, one-fourth of 1 per cent. quarterly.

Stock exchanges, 1¼ per cent. quarterly.

Dealers in oil, 2 per cent. annually.

Text-book publishers, 1 per cent. quarterly.

Private car line companies, 2 per cent, quarterly.

Pipe line companies, 2 per cent. quarterly.

Oil producers, 1 per cent. quarterly. (General Laws, 1905, page 358, *et seq.*)

Life insurance companies, 2¼ per cent. annually.

Fire insurance companies, 2¼ per cent. annually.

Fire and marine, marine, marine and inland, life and accident, life and health, accident, credit, title, steam boiler, live stock and casualty and all other insurance companies, except fidelity and guaranty companies, 1¾ per cent. annually. (General Laws, 1905, pages 374 and 427.)

In each of the above specified instances the gross receipts tax law applies to persons, firms, associations of persons and corporations.

It is obvious that the tax statute under consideration herein, together with all other tax measures upon gross receipts, passed by the Twenty-ninth Legislature, was but an expansion of that particular branch of occupation taxes which had its inception and introduction into our system in 1870.

In 1870 it was classified as an occupation tax, and it has maintained that character in all subsequent legislation.

The following reference to every act of the Legislature since 1879 concerning gross receipts taxes will reflect the legislative mind as to the character of the tax:

Acts Sixteenth Legislature, General Laws 1879, Secs. 3 and 4, pp. 143, 47-48.

Acts Seventeenth Legislature, 1881, Sec. 3, pp. 54 and 58.

Acts Twenty-first Legislature, General Laws 1889, caption and Art. 4665, pp. 24-28.

Acts Twenty-third Legislature, General Laws 1893, Sec. 1, p. 156.

Revised Statutes 1895, Art. 5049, Subdiv. 36; Art. 5243e.

Acts Twenty-fifth Legislature, General Laws, 1897, Art. 5243e, p. 140.

Acts Twenty-fifth Legislature, General Laws 1897, Art. 5243k, and Sec. 2, p. 170.

Acts Twenty-ninth Legislature, General Laws 1905. See last paragraph of each section, p. 258, et seq., and especially Section 14, p. 368.

Acts Twenty-ninth Legislature, General Laws 1905, Sec. 1 and Art. 5243e, pp. 373 and 374.

Acts Twenty-ninth Legislature, Called Session, General Laws 1905, Art. 5243e, pp. 427 and 428.

Acts Twenty-ninth Legislature, General Laws 1905, caption and Sec. 6, pp. 336-338.

Acts Thirtieth Legislature, First Special Session, Chap. 18, pp. 479-490.

In the case of Texas Company vs. Stephens, 100 Texas, 638, which involved the same section of the statute involved in the case at bar, as well as Section 13, imposing a tax of one per cent. of the gross receipts of oil producers, the Supreme Court say:

> "In its attack upon the validity of the statute the plaintiff has invoked many provisions of the State and Federal Constitutions, and urged many propositions which have so little relevancy that they require no further notice. We shall confine our attention to those which seem to us to present real questions. One of them is that the sections before referred to, which are the ones applying to the business in which plaintiff has been engaged, levy an ad valorem tax upon the value of its property in excess of the rate allowed by the Constitution. This contention has been made with reference to a number of like statutes in this State and has invariably been overruled. (Stephens vs. State, 4 Texas, 137; Albrecht vs. The State, 8 Texas Ct. App., 216; The State vs. Galveston, H. & S. A. R. R. Co., 16 Texas Ct. Rep., 909; 2 Cooley on Taxation, pp. 1094, 1095, 1105, 1106, 1107, 1109, and authorities cited.)
>
> "In the case of Producers' Oil Co. vs. The State, in which this court recently refused a writ of error, the point was made that the tax levied by Section 13 of the act under consideration upon producers of oil was a tax upon property. But the courts below held otherwise, and this court in refusing the writ of error approved the holding. The taxes in the act are levied because the persons specified are engaged in particular, defined businesses, and are

laid upon the carrying on of those businesses. The amounts of the taxes to be paid by those engaged in the businesses are to be ascertained by various standards depending upon the characters of such businesses, but in no instance is a tax laid upon all or any of the property owned by such persons. Had the statute simply defined the businesses and imposed a tax of a fixed sum upon each, no one would have questioned that it was a tax upon the doing of the businesses, in other words, an occupation tax. The fact that the amount of the tax is to be determined, in prescribed methods, from the value, or extent, or magnitude of the businesses done can not convert it into an ad valorem tax upon the property of the persons conducting them. We could only hold that it does by disregarding not only the nature of the provisions themselves and the language in which they are expressed, but the course of judicial decision here and elsewhere and of former legislation in this State, by which such laws have been treated as imposing occupation taxes.

"As especial reliance to sustain this contention is placed upon the language of Section 9, we may as well discuss it at this point, and, as other questions arise out of it, we set out its material provisions. It provides that each and every person, association or corporation, 'which shall engage * * * in the wholesale business of coal oil, naphtha (sic), benzine or any other mineral oils refined from petroleum, and any and all mineral oils, shall pay an annual tax of two per cent upon their gross receipts from any and all sales in this State of any of said articles, * * * and an annual tax of two per cent of the cash market value of any and all of said articles that may be received or possessed or handled or disposed of in any manner other than by sale in this State; and it is hereby expressly provided that delivery to or possession by any person, etc., in this State of any of the articles hereinabove mentioned * * * from whatever source the same may have been received, shall for the purpose of this act, be held and considered such a sale and such ownership and possession of such articles and property (when no sale is made) as will and shall subject the same to the tax herein provided for.'

"The concluding language quoted is appropriate to the levy of a tax upon the property mentioned, but it is controlled by the leading provision defining the business on the doing of which the tax is imposed. This, when considered in connection with the general scope and purpose of the statute, fixes the character of the tax, and all of the other provisions of Section 9 must be viewed as merely dealing with the incidents of the business taxed, and as specifying more fully the elements of value to be taken into account in arriving at the amount charged upon the pursuing of the occupation and as probably intended, also to prevent evasions. When the character of the business and of the tax upon it are ascertained, the operation of the incidental provisions, inapt as the language is when applied to such a subject, may be in most cases determined without great difficulty. The persons referred to as receiving, pos-

sessing, handling or disposing of the specified commodities are those first mentioned as engaged in the wholesale business of oil, etc., from which it follows that the receiving, etc., must be while they are so engaged; that is, as a part or incident of that business. The provision specially relied on as characterizing the tax as one upon the property can not be isolated from those which control its meaning, and when all are considered together, no doubt is left as to their character. It is urged that it is apparent from the statute itself that it is a mere evasion of Section 9, Article 8 of the Constitution, limiting the rate of taxation upon property to thirty-five cents on the one hundred dollars valuation; but the power to impose taxes on occupations is expressly given by the same article, with no limitation as to their amount or the manner in which it shall be ascertained, and, as we have already shown, the method here employed had been sanctioned by judicial decisions and legislative practice long before the adoption of the present Constitution. The courts have no authority to interfere merely because heavier burdens are imposed than ever before, if that be the fact."

In the case at bar the Supreme Court of Texas holds that the tax in question is purely and simply an occupation tax.

In New York Central Railroad Company vs. Miller, 202 U. S., 596, this court said:

"We are not curious to inquire exactly what kind of a tax this is to be called. If it can be sustained by the name given to it by the local courts, it must be sustained by us."

The Supreme Court of the United States will follow the decision of the Supreme Court of Texas in regard to the meaning of the Constitution and laws of Texas.

Kehrer vs. Stewart, 197 U. S., 69; Osborne vs. Florida, 164 U. S., 560; Turner vs. Wilkes, 173 U. S., 461; Western Union Telegraph Company vs. Henderson, 68 Federal, 588; Bank vs. Penn, 167 U. S., 462.

In Gatewood vs. North Carolina, 203 U. S., at p. 541, this court, speaking through Mr. Justice White, said:

"In the argument it is insisted that the construction given by the Supreme Court of North Carolina to the statute is wrong, since in effect it reads out the provisions of Section 7, and it is urged that it is the duty of this court to disregard the interpretations affixed by the State court, thereby bringing the statute within the prohibitions of the Fourteenth Amendment. But it is elementary that, under the circumstances, we must follow the construction given by the State court, and test the constitutionality of the statute under that view. Armour Packing Company vs. Lacy, 200 U. S., 226; Smiley vs. Kansas, 196 U. S., 447, 455, and cases cited."

Reference to various gross receipts tax laws which have been upheld by this court will show that in many instances such taxes were treated by the court as being occupation taxes, although the statute expressly declared that the tax was upon gross receipts.

From the foregoing we deem it obvious that the tax in controversy here is unquestionably an occupation tax and we presume that it will be so considered and treated by this court.

We come now to a consideration of the questions stated in the first part of this brief.

FIRST.

DOES THE STATUTE UNDER CONSIDERATION VIOLATE THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES PROHIBITING THE STATE FROM DEPRIVING ANY PERSON OF LIFE, LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW, OR DENYING ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS?

AUTHORITIES.

Armour Packing Co. vs. Lacy, 200 U. S., 233.
Connolly vs. Union Sewer Pipe Co., 184 U. S., 540-562.
Hatch vs. Reardon, 184 N. Y., 431; 8 L. A. R. (New Series), 314. Affirmed in Hatch vs. Reardon, 204 U. S., 160.
Nicol vs. Ames, 173 U. S., 509.
American Sugar Refining Co. vs. Louisiana, 179 U. S., 189.
Cook vs. Marshall County, 196 U. S., 268.
Savannah T. & I. Ry. Co. vs. Savannah, 198 U. S., 392.
Giozza vs. Tiernan, 148 U. S., 662.
Metropolitan Street Ry. Co. vs. State Board of Tax Commissioners, 199 U. S., 1.
Street Ry. Co. vs. State Board of Tax Commissioners, 199 U. S., 53.
Magoun vs. Illinois Trust Co., 170 U. S., 295.
Bell's Gap R. R. Co., vs. Pennsylvania, 134 U. S., 237.
Home Insurance Co. vs. New York, 134 U. S., 594.
District of Columbia vs. Brooke, 214 U. S., 150.
Pacific Express Co. vs. Seibert, 142 U. S., 339-351.
Cargill vs. Minnesota, 180 U. S., 452.

Michigan Central R. R. Co. vs. Powers, 201 U. S., 293.
Cox vs. Texas, 202 U. S., 446.
Texas Company vs. Stephens, 100 Texas, 628.
King vs. Mullins, 171 U. S., 435.

The statute complained of provides that there shall be collected from each and every person, association of persons or corporations created by the laws of Texas or any State or nation which shall engage in the State in wholesale business of coal oil, naphtha, benzine or other mineral oils refined from petroleum, and any and all mineral oils, an annual tax of two per cent upon the gross receipts from any and all sales in the State of any of said articles; and an annual tax of two per cent. of the cash market value of any and all of said articles that may be received or possessed or handled or disposed of, in any manner other than by sale in the State.

In considering this statute it must be kept in mind that the rule is well settled by a long and unbroken line of decisions, commencing shortly after the adoption of the Constitution, and always consistently followed, that no statute shall be declared unconstitutional except in a clear case; that every possible presumption is in favor of its validity; that if a statute is susceptible of two constructions, one of which brings it within and the other forces it beyond the constitutional power of the Legislature, the former should be adopted; and the burden of proof is upon those who affirm the unconstitutionality of the legislation to show clearly that it is in violation of the Constitution.

Hylton vs. U. S., 3 Dall., 175; 1 L. Ed. 556.
The Trade Mark Cases, 100 U. S., 96.
Nichol vs. Ames, 173 U. S., 514.
Buttfield vs. Stranahan, 192 U. S., 470.

It is contended that Section 9 of the act in question denies to plaintiff in error the equal protection of the laws guaranteed to it under the Furteenth Amendment to the Constitution of the United States, in that it and other wholesale dealers in coal oil, naphtha, benzine, etc., are arbitrarily discriminated against; that the classification made by the statute has no reasonable basis, but is wholly arbitrary and capricious. We cheerfully concede that the Legislature has no power to form classes for the purpose of taxation that arbitrarily discriminate between persons or corporations in

substantially the same situation. The discrimination must rest on some reasonable ground of difference, but we insist that the classification in this case is a natural one. The Supreme Court of Texas, in the case of Texas Company vs. Stephens, 100 Texas, 640, having under consideration the same statute involved in the case at bar, said:

"Another objection is that the statute discriminates between plaintiff and others pursuing occupations which belong to the same class, in imposing heavier taxes upon plaintiff than are imposed upon them, and is, therefore, violative of the Constitution of the State, which provides that 'occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax,' and also violative of the Fourteenth Amendment of the Constitution of the United States in that it denies to plaintiff the equal protection of the laws. The very language of the Constitution of the State implies power in the Legislature to classify the subjects of occupation taxes and only requires that the tax shall be equal and uniform upon the same class. Persons who, in the most general sense, may be regarded as pursuing the same occupation, as for instance merchants, may thus be divided into classes and the classes may be taxed in different amounts and according to different standards. Merchants may be divided into wholesalers and retailers, and if there be reasonable grounds, these may be further divided according to the particular classes of business in which they may engage. The considerations upon which such classification shall be based are primarily within the discretion of the Legislature. The courts, under the provisions relied on, can only interfere when it is made clearly to appear that an attempted classification has no reasonable basis in the nature of the business classified, and that the law operates unequally upon subjects between which there is no real difference to justify the separate treatment of them undertaken by the Legislature. This is the rule in applying both the State and Federal Constitutions, and it has been so often stated as to render unnecessary further discussion of it. (The State vs. Galveston, H. & S. A. R. R. Co., supra.)

"The objection urged along this line is more particularly directed against Section 9 because it is said to levy higher taxes upon those engaged in the 'wholesale business of oil,' etc., than upon others engaged in wholesale businesses of other commodities. This is predicated entirely upon a comparison of the laws levying taxes upon the several classes of business and upon the bare fact that they levy different amounts or by different standards, and is, therefore, a mere assumption of the true point of controversy, which is, whether or not there was reasonable ground for the discriminations made by the Legislature. We have not been aided by a showing of any facts by which a comparison might be made of the characters of the different businesses and of the conditions under which they are pursued. That there

> may be differences, affecting the question between the 'wholesale business of oil, etc.,' and wholesale business carried on with other articles of commerce, is obvious. Differences in the profits derived, in the extent of the consumption of the articles, and, therefore, in the facility with which the burdens may, in a course of business, be distributed among consumers generally, and other conditions that might be supposed, could properly be taken into consideration by the Legislature in making classifications and determining the amount of the tax to be laid upon each; and it would be only an extreme and a clear case that would justify an interference by the courts with the legislative action. We see nothing of the kind in this law. The mere fact that discrimination is made proves nothing against a classification which is not, on its face, an arbitrary, unreasonable or unreal one."

In the enactment of tax laws, and in many other instances, the Legislature may classify persons and things in the administration of government. It does not follow that because one man of one class happens to be treated by law differently from another in another class, that the equality clause of the Federal Constitution is violated. That clause only requires the same means and methods to be applied impartially to all the constituents of a class, so that the law will operate equally and uniformly upon all persons in the same station.

In the case of Michigan Central Railroad Co. vs. Powers, 201 U. S., 293, this court, through Mr. Justice Brewer, said:

> "There is no general supervision on the part of the nation over State taxation, and in respect to the latter the State has, speaking generally, the freedom of a sovereign both as to objects and methods. It was well said by Judge Wanty, delivering the opinion of the Circuit Court in this case, that 'there can at this time be no question, after the frequent and uniform expressions of the Federal Supreme Court, that it was not designed by the Fourteenth Amendment to the Constitution to prevent a State from changing its system of taxation in all proper and reasonable ways, nor to compel the States to adopt an iron-clad rule of equality, to prevent the classification of property for purposes of taxation, or the imposition of different rates upon different classes. It is enough that there is no discrimination in favor of one as against another of the same class, and the method for the assessment and collection of taxes is not inconsistent with natural justice.'"

In the case of Armour Packing Co. vs. Lacy, 200 U. S., 233, this court held that the classification of meat packing houses could not be said to be an arbitrary selection or not rest on reasonable grounds, and that the Fourteenth Amendment was not intended to prevent a State from adjusting its

system of taxation in all proper and reasonable ways, or through the undoubted power of classification to impose different taxes upon different trades and professions. In this case the court say:

> "By the act under consideration the tax is levied upon every packing house doing business in the State, which includes by its terms both domestic and foreign meat packing houses. It is true that it appears that where the Armour Packing Company does business certain persons sell both by wholesale and retail packing house products, and yet are not subjected to this tax, but also that those parties are not doing either in North Carolina or elsewhere a packing house business. And so it appears that in North Carolina, at the points where the Armour Packing Company is engaged in business, and at other places in the State, there are establishments engaged in business which pack articles of food other than meats, such as peas, beans, pumpkins, etc., and offer them for sale; but we can not accept the suggestion that the statute is void as denying the equal protection of the laws to meat packing houses because houses packing vegetables and the like are not included in the same classification and subject to the same tax."

In the case of Connolly vs. Union Sewer Pipe Company, 184 U. S., 540, 562, it is held that "a tax may be imposed only upon certain callings and trades, for when the State exerts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if a State could not tax any property or calling unless, at the same time, it taxed all property or all callings."

In the case of Nicol vs. Ames, 173 U. S., 509, the Supreme Court of the United States had under consideration an act of Congress which provided that "Upon each sale, agreement of sale or agreement to sell any products or merchandise at any exchange or board of trade, or similar place, either for present or future delivery, for each one hundred dollars in value of said sale or agreement of sale or agreement to sell, one cent, and for each additional one hundred dollars or fractional part thereof in excess of one hundred dollars, one cent." It was urged that this tax was not uniform as required by the Constitution; that sales at an exchange or board of trade were singled out for taxation under the act although they differed in no substantial respect from sales at other places; and that there was, therefore, no just ground for segregating or classifying such sales from those made elsewhere. It was claimed that a sale at an exchange or board of trade was not a privilege or facility

which could or ought justly to be taxed, while all other sales at other places were exempt from taxation; and that there was no reasonable ground, therefore, for the assertion that such a tax was uniform within the meaning of the Constitution. It was said not to be uniform because unequal, taxing sales at exchanges and exempting all other sales. In passing upon the objections urged the court said:

> "This general objection on the ground of want of uniformity is not, in our judgment, well founded. Whether the word 'uniform' is to be understood in what has been termed its 'geographical' sense, or as meaning uniformity as to all the taxpayers similarly situated with regard to the subject matter of the tax, we think this tax is valid within either meaning of the term. In our judgment a sale at an exchange does form a proper basis for a classification which excludes all sales made elsewhere from taxation. If it were to be assumed that taxes upon corporate franchises or privileges may be imposed only by the authority that created them, it does not follow that no privilege or facility can be taxed which is not created by the government of a State or by Congress. In order to tax it the privilege or facility must exist in fact, but it is not necessary that it should be created by the government. The question always is, when a classification is made, whether there is any reasonable ground for it, or whether it is only and simply arbitrary, based upon no real distinction and entirely unnatural. Gulf, Colorado, etc., Ry. vs. Ellis, 165 U. S., 150-155; Magoun vs. Illinois Trust and Savings Bank, 170 U. S., 283-294. If the classification be proper and legal, then there is the requisite uniformity in that respect."

It was also urged in the above case that the act taxed only those who made sales and not those who made purchases, and those who sold products and merchandise and not those who sold bonds, stocks, etc. These were discriminations, it was said, which did not follow the rule of uniformity, and hence rendered the tax void. In answer to the objections made this court said:

> "A purchase occurs whenever a sale is effected, and to say that a purchaser at an exchange sale must be taxed for the facilities made use of in making the purchase, or else that the tax on the seller is void, is simply to insist upon doubling the tax.
>
> "Nor is it necessary to tax the use of the privilege under all circumstances in order to render the tax valid upon its use in particular cases. We see no reason why it should be necessary to tax a privilege whenever it is used for any purpose or else not to tax it at all. It is not in its nature indivisible. A tax upon the privilege when used for one purpose does not require for its validity that the same privilege should also be taxed when used for another and a totally distinct purpose. It may be the same privilege, but when it

is used in different cases to accomplish sales of wholly different things, between which there is no relation whatever, one use may be taxed and the other not, and no rule of uniformity will thereby be violated."

In the case of Cargill vs. Minnesota, 180 U. S., 452, this court held that a statute of Minnesota requiring all persons or corporations owning or operating any warehouses for the receipt and storage of any grain located upon the right-of-way of a railroad to take out a license and pay a fee therefor was not invalid by reason of its non-application to those who own or operate warehouses *not* situated on the right-of-way of a railroad. It was held that such a classification was not so unreasonable as to amount to a denial of equal protection of the law.

In People ex rel. Hatch vs. Reardon, 184 N. Y., 431, 8 L. R. A. (N. S.), 314, the Court of Appeals of New York had under consideration a statute of that State providing for a tax on the sale and transfer of stock certificates. The act was attacked as being invalid on the ground that it made an improper classification. In passing upon this objection the court said:

"Second. The classification made by selecting one kind of property and taxing the transfer of that only is assailed as so arbitrary, discriminating and unreasonable as to deprive certain persons of their property without due process of law, and to withhold from them the equal protection of the laws. All taxation is arbitrary, for it compels the citizen to give up a part of his property; it is generally discriminating, for otherwise everything would be taxed, which has never yet been done, and there would be no exemption on account of education, charity, or religion; and frequently it is unreasonable, but that does not make is unconstitutional, even if the result is double taxation. People vs. Home Ins. Co., 92 N. Y., 328, 347. The right to tax is not granted by the Constitution, but of necessity underlies it, because government could not exist or perform its functions without it. While it may be regulated and limited by the fundamental law, it exists 'independently of it as a necessary attribute of sovereignty.' People vs. Adirondack R. R. Co., 160 N. Y., 225, 236; 54 N. E. Rep., 689, 692. 'The power of taxation being legislative, all the incidents are within the control of the Legislature. The purposes for which a tax shall be levied; the extent of taxation; the apportionment of the tax; upon what property or class of persons the tax shall operate; whether the tax shall be general or limited to a particular locality, and in the latter case, the fixing of a district, of assessment; the method of collection, and whether the tax shall be a charge upon both person and property, or only on the land, are matters within the discretion of the Legisla-

ture and in respect to which its determination is final.' Genet vs. Brooklyn, 99 N. Y., 296-306; 1 N. E. Rep., 777, 783. 'A tax may be imposed only on certain callings and trades, for, when the State exerts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if the State could not tax any property or calling unless at the same time it taxed all property or all callings.' Connolly vs. Union Sewer Pipe Co., 184 U. S., 540, 562, 46 L. Ed., 679, 690, 22 Sup. Ct. Rep., 431, 440; Armour Pkg. Co. vs. Lacy, 200 U. S., 226, 235, 50 L. Ed. 451, 453, 26 Sup. Ct. Rep., 232, 234. 'We can not say that treating stocks of corporations as a class subject to special restrictions was unjust discrimination or the denial of the equal protection of the laws.' Otis vs. Parker, 187 U. S., 606, 610; 47 L. Ed., 323, 328; 23 Sup. Ct. Rep., 168, 170. 'The Legislature must decide when and how, and for what public purposes a tax should be levied and must select the subjects of taxation.' 1 Cooley Taxn., 3d Ed., 255.

"There is no express restriction upon this power in our State Constitution, and no implied restriction except by the primary guaranties relating to life, liberty, property and due process of law. The same is true of the Federal Constitution, except as to certain subjects of national interest under the control of Congress, such as imports, patent rights, and agencies used to carry the powers of Congress into execution. Subject to these restraints the Legislature has supreme control of the power to tax; and its action, even if arbitrary, discriminating and unreasonable, is binding upon all persons and property within the boundaries of the State. The State retained all the power of legislation that it did not part with in adopting the Federal Constitution or consenting to the amendment thereof; and, subject to that exception, it is as supreme as the British Parliament, which is restrained only by the custom of the realm and the conservatism of the people. Taxes upon the right of succession to property by will and intestate law, on special franchises, and upon the sale of intoxicating liquors, are recent instances of the exercise of this power by the State through the selection of special subjects of taxation involving the exemption of all others, each of which was attacked as in violation of both Constitutions, but all were sustained by the courts. The tariff and internal revenue laws show that the same power of selection has been exercised by Congress, and the Federal courts have uniformly upheld it. Indeed, the prototype of the statute before us was an act of Congress passed in 1898, known as the 'war revenue act' (Act June 13, 1898, Chap. 448, 30 Stat. at L., 448, U. S. Comp. Stat., 1901, p. 2286) imposing a stamp tax on sales, transfers and deliveries of stock certificates, which was sustained without dissent by the Circuit and Supreme Courts of the United States. United States vs. Thomas, 115 Fed. Rep., 207, 192 U. S., 363, 48 L. Ed., 481, 24 Sup. Ct. Rep., 305. A like tax on sales of merchandise, although expressly limited to those made at 'any exchange or board

of trade,' leaving all other sales untouched, was also sustained, and the declaration made that 'a sale at an exchange does form a proper basis for a classification which excludes all sales made elsewhere from taxation.' Nicol vs. Ames, 173 U. S., 509, 521, 43 L. Ed., 786, 793, 19 Sup. Ct. Rep., 522, 527.

"The Legislature has power to classify as it sees fit by imposing a heavy burden on one class of property and no burden at all upon others, the remedy for injudicious action being in the hands of the people, not of the courts. Arbitrary selection and discrimination characterize the history of legislation, both State and National, with reference to taxation; yet, when all persons and property in the same class are treated alike, it has uniformly been sustained both by the State and Federal courts. The tax on tobacco, on oleomargarine, and the like is not less arbitrary or discriminating than the tax in question. While a tax upon the particular house, or horse, or the houses or horses of a particular man, or on the sale thereof, would obviously invade a constitutional right, still a tax upon all houses, leaving barns and business buildings untaxed, or upon all horses or the sale thereof, leaving sheep and cows untaxed, however unwise, would be within the power of the Legislature. This is true of a tax on all houses with 'more than one chimney,' or 'with more than one hearthstone,' or on all race horses. The power of taxation necessarily involves the right of selection, which is without limitation, provided all persons in the same situation are treated alike and the tax imposed equally upon all property of the class to which it belongs. Re McPherson, 104 N. Y., 306, 318, 58 Am. Rep., 502, 10 N. E. Rep., 685; Re Gould, 156 N. Y., 423, 427, 51 N. E. Rep., 287. The equal protection of the laws 'only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances.' Kentucky Railroad Cases, 115 U. S., 321, 337, 29 L. Ed., 414, 419, 6 Sup. Ct. Rep., 57, 63. Or, in other words, all persons must be 'treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed.' Magoun vs. Illinois Trust and Savings Bank, 170 U. S., 283, 293, 42 L. Ed., 1037, 1042, 18 Sup. Ct. Rep., 594, 598; Hayes v. Missouri, 120 U. S., 68, 30 L. Ed., 578, 7 Sup. Ct. Rep., 350; Barbier vs. Connolly, 113 U. S., 27, 32, 28 L. Ed., 923, 925, 5 Sup. Ct. Rep., 357. 'Let it reach all of a class, either of persons or things, it matters not whether those included in it be one or many, or whether they reside in any particular locality or are scattered all over the State.' 1 Cooley, Taxn., 3d Ed., 260.

"The tax in question is not imposed upon property, but on the transfer of a certain class of property, extensively bought and sold throughout the State. It does not discriminate between different kinds of stocks, taxing the sale of some and leaving others untaxed, but treats all in the class alike. The class includes all sales of certificates issued, by any domestic or foreign association, company or

corporation. It is a large and comprehensive class, as is shown by the revenue produced, which amounts to five or six millions per annum. The sales affected are made chiefly for speculation, which may have influenced the Legislature in making the selection. The statute operates equally and uniformly upon all transfers of the class named when made by any person within the State. All persons who sell stocks are treated alike, and all parts of the State are treated alike. It applies with equal force to all sales, whether in the city or country, in exchanges, offices, or on the street, by farmers, mechanics, brokers and others. The classification violates neither Constitution."

The above case was affirmed by this court in the case of Hatch vs. Reardon, 204 U. S., 160, opinion by Mr. Justice Holmes.

In American Sugar Refining Company vs. Louisiana, 179 U. S., 189, it is held that a statute imposing a license tax upon persons and corporations carrying on the business of refining sugar and molasses does not, by exempting from such tax planters and farmers grinding and refining their own sugar and molasses, deny sugar refiners the equal protection of the laws within the Fourteenth Amendment.

The case of Cook vs. Marshall County, 196 U. S., 268, involved the constitutionality of Section 5007 of the Iowa Code, which imposed a tax of $300.00 per annum upon every person, partnership or corporation dealing in cigarettes. It was urged that the section referred to denied to the plaintiffs the equal protection of the laws, by reason of alleged discriminations arising from the final sentence that "the provisions of this section shall not apply to the sales by jobbers and wholesalers in doing interstate business with customers outside of the State."

In passing upon this question the court say:

"We are referred in this connection to a series of well-known cases arising under the anti-trust laws of the several States, to the effect that laws against combinations in trade must be uniform in their application as applied to all persons within the same general class. The leading case upon this point is Connolly vs. Union Sewer Pipe Company, 184 U. S., 540, where a law of Illinois against combinations to regulate prices and productions, and create restrictions, was held to be invalid by reason of the exemption of agricultural productions or live stock, while in the hands of the producer or raiser.

"A similar case is that of Cotting vs. Kansas City Stock Yards Co., 183 U. S., 79, wherein a statute of Kansas regulating the prices to be paid for the use of public cattle stock yards was held invalid by reason of the fact that it was intended to apply only to the stock

yards of Kansas City, and not to other companies or corporations engaged in like business in other portions of the State.

"These cases, however, have but limited application to laws imposing taxes, where the right of classification is held to permit of discrimination between different trades and callings when not obviously exercised in a spirit of prejudice or favoritism. Kentucky Railroad Tax Cases, 115 U. S., 321; Magoun vs. Illinois Trust and Savings Bank, 170 U. S., 283; American Sugar Refining Co. vs. Louisiana, 179 U. S., 89; Belle's Gap Railroad Co. vs. Pennsylvania, 134 U. S., 232.

"This distinction was recognized by Mr. Justice Harlan in Connolly vs. Union Sewer Pipe Co. on page 562, wherein it is said 'a State may in its wisdom classify property for purposes of taxation and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade the rights secured by the Constitution of the United States.' It can scarcely be doubted, that, if the Connolly case had dealt with the subject of taxation, a discriminative tax upon producers of agricultural products, either greater or less than that imposed upon other manufacturers or producers, might have been held valid without denying to either party the equal protection of the laws. The holding in that case was simply that, considering that the object of the statute was to prevent combinations of capital or skill for certain purposes, the exemption of farmers was based upon no sound distinction, and rendered the law invalid as to other classes included within it.

"There is a clear distinction in principle between persons engaged in selling cigarettes generally or at retail, and those engaged in selling by wholesale to customers without the State. They are two entirely distinct occupations. One sells at retail, and the other at wholesale, one to the public generally, and the other to a particular class; one within the State, and the other without. From time out of mind it has been the custom of Congress to impose a special license tax upon wholesale dealers different from that imposed upon retail dealers. A like distinction is observed between brewers and rectifiers, wholesale and retail dealers in leaf tobacco and liquors, manufacturers of tobacco and manufacturers of cigars, as well as peddlers of tobacco. It may be difficult to distinguish these several classes in principle, but the power of Congress to make this discrimination has not, we believe, been questioned.

"Why the Legislature should have made the distinction found in Section 5007 is not entirely clear, but it probably arose from the belief that the imposition of a license tax upon wholesale exporters of cigarettes would be as much an interference with interstate commerce as the imposition of a similar tax upon importers from abroad was held to be in Brown vs. Maryland. We are satisfied the section is not open to the objection of denying to the dealers in cigarettes the equal protection of the laws."

Liquor dealers are not denied the privileges or immunities of citizens of the United States under the United States Constitution, Fourteenth Amendment, because producers or manufacturers of domestic wines are exempted by Texas Revised Civil Statutes of 1895, Article 5060i, while such wines are in their hands, from the tax imposed and the bond required by preceding articles regulating the sale of intoxicating liquors.

Cox vs. Texas, 202 U. S., 446.

The exemption of the subsurface street railway in New York City from the operation of the special franchise tax authorized by N. Y. Laws 1899, Chap. 712, does not make that statute invalid as denying the owners of the surface street railways in that city the equal protection of the laws or as depriving them of their property without due process of law.

N. Y. ex rel. Metropolitan Street Ry. Co. vs. State Board of Tax Commissioners, 199 U. S., p. 1.

N. Y. ex rel. 23rd Street Ry. Co. vs. State Board of Tax Commissioners, 199 U. S., p. 53.

A street railway company is not denied the equal protection of the laws by a municipal tax on its business at a rate of $100 per mile or fraction of a mile of its trackage in the city streets because a steam railway making an extra charge for local deliveries of freight brought over its road from outside the city is not subjected to this tax.

Savannah T. & I. Ry. Co. vs. Savannah, 198 U. S., 392.

Under the Fourteenth Amendment property may be classified at different rates for the purposes of taxation. It does not prohibit special legislation in that regard either to the extent to which it operates or the objects to be obtained, so long as there is no discrimination in favor of one as against another of the same class.

Giozza vs. Tiernan, 148 U. S., 662.

Approved in Magoun vs. Illinois Trust Company, 170 U. S., 295.

American Sugar Refining Company vs. Louisiana, 179 U. S., 95, upholding Louisiana statute, imposing license tax upon persons and corporations carrying on a business of sugar refiners, though it exempts planters refining their own sugar.

Kersey vs. Terra Haute, 161 Ind., 474, 68 N. E., 1029,

upholding ordinance imposing license tax on vehicles using city streets, but omitting to tax street cars, automobiles and vehicles of non-residents.

The provision in the West Virginia Constitution exempting tracts of less than one thousand acres of land from forfeiture to the State because not properly entered in assessment books is not unconstitutional as denying owner of larger tract equal protection of the laws.

King vs. Mullins, 171 U. S., 435.

Interurban railroad companies operated by electricity may be taxed by a different method than ordinary railroads.

Railway Co. vs. State, 128 Wis., 656, 108 N. E., 586.

The power of the State to distinguish, select and classify objects of taxation has a wide range of discretion. Classification must be reasonable, but there is no precise application of the rule of reasonableness, and there can not be an exact exclusion or inclusion of persons and things.

Magoun vs. Illinois Trust, etc., Bank, 170 U. S., 283.

An exemption form taxation is valid under the equal protection clause of the Federal Constitution if founded upon a reasonable distinction in principle, and where the discrimination is not purely arbitrary, oppressive or capricious and made to depend on differences of color, race, nativity, religious opinion, political affiliations or other considerations having no possible connection with the duties of citizens as taxpayers.

American Sugar Refining Co. vs. Louisiana, 179 U. S., 89.

Bell's Gap Railroad Company vs. Pennsylvania, 134 U. S., 237.

From the opinion by Mr. Justice Bradley in this case, which involved the validity of a Pennsylvania tax statute, we quote the following:

> "The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in

a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature, or the people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject that would include all cases. They must be decided as they arise. We think we are safe in saying that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation. * * * The general purpose and scope of the Fourteenth Amendment, and the general qualifications necessary to be applied to it, are well stated in Barbier vs. Connolly, 113 U. S., 27, 31.

"Mr. Justice Field, in delivering the opinion of the court, there said:

"'The Fourteenth Amendment in declaring that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, undoubtedly intended not only that there should be no arbitrary deprivation of life, or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances, in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that in the administration of criminal justice, no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity.'

"With due regard to these considerations, we are clearly of opinion that the method of assessing the tax in question, on the face value of corporate securities in Pennsylvania, is not violative of the Fourteenth Amendment to the Constitution."

Home Insurance Company vs. New York, 134 U. S., 594.

This case arose under a statute of New York, which imposed a tax upon "the corporate franchise or business" of all corporations incorporated under any law of that State, or of any other State or country, and doing business within the State, the tax being measured by the extent of the dividends of the corporation in the current year.

The court held that the tax did not deprive the taxpayer of the equal protection of the laws.

Mr. Justice Field, in rendering the opinion, says:

> "Nor is the objection tenable that the statute, in imposing such tax, conflicts with the last clause of the first section of the Fourteenth Amendment of the Constitution of the United States, declaring that no State shall deprive any person within its jurisdiction of the equal protection of the laws. It is conceded that corporations are persons within the meaning of this amendment. It has been so decided by this court. Pembina Cons. Silver Co. vs. Pennsylvania, 125 U. S., 181. But the amendment does not prevent the classification of property for taxation—subjecting one kind of property to one rate of taxation, and another kind of property to a different rate—distinguishing between franchises, licenses and privileges, and visible and tangible property, and between real and personal property. Nor does the amendment prohibit special legislation. Indeed, the greater part of all legislation is special, either in the intent to which it operates or the objects sought to be obtained by it. And when such legislation applies to artificial bodies, it is not open to objection if all such bodies are treated alike under similar circumstances and conditions, in respect to the privileges conferred upon them and the liabilities to which they are subjected. Under the statute of New York, all corporations, joint stock companies and associations of the same kind are subjected to the same tax. There is the same rule applicable to all under the same conditions in determining the rate of taxation. There is no discrimination in favor of one against another of the same class. See Barbier vs. Connolly, 113 U. S., 29, 32; Soon Hing vs. Crowley, 113 U. S., 703, 709; Missouri Pacific Ry. vs. Humes, 115 U. S., 512, 523; Missouri Pacific Ry. vs. Mackey, 127 U. S., 205, 209; Minneapolis Ry. Co. vs. Beckwith, 129 U. S., 26, 32."

In the case of District of Columbia vs. Brooke, 214 U. S., 150, the court, speaking through Mr. Justice McKenna, say:

> "However, the question of the power of Congress, broadly considered, to discriminate in its legislation is not necessary to decide, for whether such power is expressly or impliedly prohibited, the prohibition can not be stricter or more extensive than the Fourteenth Amendment is upon the States. That amendment is unqualified in its declaration that a State shall not 'deny to any person within its jurisdiction the equal protection of the laws.' Pass-

ing on that amendment, we have repeatedly decided—so often that a citation of the cases is unnecessary—that it does not take from the States the power of classification. And also that such classification need not be either logically appropriate or scientifically accurate. The problems which are met in the government of human beings are different from those involved in the examination of the objects of physical world and assigning them to their proper associates. A wide range of discretion, therefore, is necessary in legislation to make it practical, and we have often said that the courts can not be made a refuge from ill-advised, unjust or oppressive laws."

SECOND.

THE STATUTE UNDER CONSIDERATION IS NOT VOID BY REASON OF THE PROVISION FOR PENALTIES.

The act provides:

"Should any person, association of persons, or corporation, or the officers or agents of any such corporation, person or association of persons herein named, fail to make the report herein provided for, and pay said taxes, for thirty days after the termination of any quarter of the year, then he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than fifty nor more than one hundred dollars. Each and every day after said thirty days have expired shall be deemed a separate offense. In addition thereto, in the event of the failure of the officers or agents of any such company or corporation to make the reports and pay said taxes, for thirty days after the termination of any quarter of the year, each and every such company or corporation, or their officers or agents, so failing, shall forfeit and pay to the State the sum of twenty-five dollars for each day said report and payment are delayed." See Sec. 9, of Chap. 148, General Laws of Texas, 1905.

AUTHORITIES.

Texas Company vs. J. W. Stephens, 99 S. W. Rep., 161.
Texas Company vs. J. W. Stephens, 103 S. W. Rep., 485, 100 Texas, 628.
Pacific Express Co. vs. Seibert, 142 U. S., 339-351.
Western Union Tel. Co. vs. Indiana, 165 U. S., 307.
Languille vs. State, 4 Texas Appeals, 312.
State vs. Rodman, 58 Minn., 393.
Southern Express Co. vs. Walker, 92 Virginia, 65.
L. & N. Ry. Co. vs. Commonwealth, 85 Ky., 198.
McChesney vs. People, 99 Ill., 219.

Mulligan vs. Hintrager, 18 Iowa, 171.
Cooley on Taxation, 3rd Edition, 298.
Scott vs. Watkins, 22 Ark., 556.
Ex Parte Lynch, Trustee, 16 S. C., 432.

No judgment for penalties was rendered in this case and that fact would seem to be a complete answer to the attack made by plaintiff in error upon the statute because of the severity of the penalties. The trial court, and the Court of Civil Appeals, in the case of Texas Company vs. Stephens, 99 S. W. Rep., 161, held that the penalties prescribed by Sections 9 and 13 were void and unenforcible. The Supreme Court of Texas, in the same case, in passing upon this question said:

> "The attack upon the statute because of the severity of the measures authorized for its enforcement and of the penalties prescribed is met by the fact that the question as to their severity is not now involved. None of them were enforced in this case, and we think it quite clear that they do not affect the right of the State to collect the taxes themselves, which is all that is now before us." (103 S. W. Rep., 485.)

It will be remembered that the opinion in the Texas Company case was adopted by the Supreme Court of Texas in the case at bar, the same issue being involved in both cases.

We think it is well settled by the authorities that if one provision of the statute is invalid and the others valid, the latter are not affected by the void provision, unless they are plainly dependent upon each other and so inseparably connected that they can not be divided without defeating the object of the statute. Duryea vs. Mayor, 96 N. Y., 477; Re Groff, 21 Neb., 647. Even if the penalty provision is stricken out of the statute under consideration, there remains a complete act, capable of being carried into effect and sufficient to accomplish the object of the law as passed in accordance with the intention of the Legislature. Bradley vs. State, 99 Alabama, 177; Keutze vs. Mobile, 120 Alabama, 623; State vs. Davis, 130 Alabama, 148, 89 Am. St. Reports, 23. Many other authorities might be cited but we deem it useless.

Plaintiff in error insists that even if the provisions for penalties can not be construed as a necessary part of Section 9 of the statute under consideration, the whole to stand or fall together, still it manifests a clear spirit of hostile discrimination. The contention is that the provision for pen-

alties is an arbitrary discrimination, not falling within the principle of classification, and, therefore, that it violates the Fourteenth Amendment to the Constitution of the United States. This contention is not sustained by the authorities. In the case of Western Union Telegraph Company vs. Indiana, 165 U. S., 307, this court, through Mr. Chief Justice Fuller, said:

> "Whether the 50 per cent penalty clause of the Act of 1893 contravenes the Constitution of the United States is the question presented on this writ. If it does not, the question whether that penalty was properly included in the judgment against the telegraph company was for the determination of the State courts. The necessity of classifying the subjects of taxation in order to reach uniform and just results, as far as possible, is not denied; nor that the infliction of penalties on delinquency is a usual and legitimate mode of compelling prompt payment of taxes; but the contention is that this provision for a 50 per cent penalty is an arbitrary discrimination, not falling within the principle of classification, and, therefore, open to constitutional objection as amounting to a denial of equal protection of the laws and a deprivation of property without due process of law.
>
> "The Supreme Court of Indiana was of the opinion that by reason of the differences in the nature of these companies, and the uses to which their property was devoted in the prosecution of their business, from other taxpayers and their property and business, the Legislature was justified in placing them in a class by themselves, and subjecting them to the particular method of effecting collection by means of penalties and suit for recovery of judgment for the delinquent taxes, with penalties added. * * * 42 N. E. Rep., 793.
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> "It has been repeatedly laid down, as stated by Mr. Justice Lamar in Pacific Express Co. vs. Seibert, 142 U. S., 339, 351, 'that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principle of uniformity or equality in taxation, and of a just adaptation of property to its burdens'; and it is equally true as to the particular means taken to enforce the collection of taxes; one rule may be adopted in respect to the admitted use of one kind of property, and another rule in respect to the admitted use of another, in order that all may be compelled to contribute their proper share to the burdens of government. * * * The amount of the penalty was a matter for the Legislature to determine, in its discretion, and the Supreme Court refers to the imposition of penalties in other instances under the statutes of Indiana, varying according to particular subjects of taxation apparently calculated to operate with quite as much harshness. * * *
>
> "We are unable to discover any ground for holding that the

> Federal Constitution was violated by this law, and agree in the view which the Supreme Court of the State expressed in the premises."

The case of Pacific Express Company vs. Seibert, referred to in the opinion just quoted from, arose under a statute of Missouri which is in many respects similar to our statute. Section 1 of the Missouri statute defines express companies, Section 2 provides for annual reports showing "the entire receipts from business done within this State, of each agent of such company doing business in this State for the year then next preceding the first day of April for and on account of such company"; and also provides for the making of reports by local agents in the event of the failure of the company to make such report as required; and further provides that when such statement is made the company shall pay to the treasurer of the State $2.00 on each $100.00 of such receipts; and further provides that "any such express company failing or refusing for more than thirty days after the first day of June in each year to render an accurate account of its receipts in the manner above provided and to pay the tax thereon, shall forfeit $100.00 for each additional day such statement and payment shall be delayed."

The express company applied to the United States Circuit Court for a writ of injunction to restrain the collection of the tax upon the ground, among others, that the statute denied to plaintiff the equal protection of the laws, in violation of the Constitution of the United States and in violation of the rule of equality and uniformity in taxation required by the Constitution of Missouri. The Circuit Court refused the writ. 44 Fed. Rep., 310.

The Supreme Court of the United States, in an opinion delivered by Mr. Justice Lamar, affirmed the decree of the Circuit Court. The opinion discloses an exhaustive study and discussion of that clause in the Fourteenth Amendment which provides that the State shall not deny to any person within its jurisdiction an equal protection of the laws. It appears to us to answer conclusively the contention of the counsel for the plaintiff in error in this case upon that issue. Attention is called to the fact that the Missouri statute prescribes, for default in payment of the taxes when due, a forfeiture of $100.00 *for each day*, and further provides that the taxpayer shall be prohibited from carrying on its business within the State until such payment be made.

And yet, opposing counsel gravely asserts that no other tax statute was quite so drastic as ours.

THIRD.

THE TAX HERE LEVIED IS NOT A TAX, OR A BURDEN UPON, OR A REGULATION OF, INTERSTATE COMMERCE.

AUTHORITIES.

Ficklin vs. Shelby Co., 145 U. S., 21.
Hatch vs. Reardon, 204 U. S., 160.
People ex rel. Hatch vs. Reardon, 184 N. Y., 431, 8 L. R. A. (N. S.), 314.
Armour Packing Co. vs. Lacy, 200 U. S., 232.
Kehrer vs. Stewart, 197 U. S., 60.
Texas Company vs. Stephens, 100 Texas, 644.
Swift & Co. vs. United States, 196 U. S., 378.

STATEMENT.

With the exception of certain evidence as to the introduction of the Kennedy Bill into the Legislature and its passage through that body, not necessary to be considered here, the following is a complete statement of facts in this case:

I.

"The Southwestern Oil Company between said dates sold its refined oils and refined products of crude oil manufactured by itself in Texas, it being a refining company, for which it received—$19,902.67.

II.

"During the same period the Southwestern Oil Company sold refined oils and other products refined from petroleum oil, not manufactured by itself, but purchased for the purpose of selling to the amount of $8,654.88.

III.

"During the same period said company sold in Texas of crude oil which it had bought in Texas, and received from said sales $175.39.

IV.

"During the same period and at the end thereof said Southwestern Oil Company had on hand refined oils and other products

refined from petroleum manufactured by itself in Texas, but not sold, or otherwise disposed of, of the value of $37,798.89.

V.

"During the same period and at the end thereof said Southwestern Oil Company had in its possession refined oils and other products refined from petroleum which were purchased by it and not manufactured by it, and not sold at the end of said period of the value of $1,548.31.

VI.

"During the same period and at the end thereof the Southwestern Oil Company had on hand crude oil purchased for the purpose of refining, but not as yet refined or otherwise disposed of during said period, of the value of $3,847.20." (Record, pp. 14 and 15.)

Plaintiff in error, by its third assignment of error filed in the Supreme Court of Texas, urged that Section 9 of what is known as the "Kennedy Tax Law," it being Chapter 148, of the General Laws of the Twenty-ninth Legislature of the State of Texas (Chapter 148, Acts 1905), is void as attempting to lay a tax or embargo on interstate and foreign commerce. (Record, p. 42.) And in its petition to this court it says that it intends to urge here each and all of its assignments of error as filed in the Supreme Court of Texas. (Record, p. 43.) However, in its brief filed herein, said assignment of error is expressly abandoned. (See plaintiff in error's brief, p. 11.)

In view of the fact that the commerce clause of the Federal Constitution is not relied upon we shall not argue that question at length, but shall call the court's attention to a few authorities in an endeavor to show that it has absolutely no application to the questions involved in this case.

From the facts quoted above, it is clear that there is not a shadow of ground for calling the transactions described "interstate commerce."

The case of People ex rel. Hatch vs. Reardon, 184 N. Y., 431, 8 L. R. A. (N. S.), 314, contains an interesting discussion of this question, and is so full in its citation of authorities that we shall take the liberty of quoting at length therefrom:

"Fifth. The final objection urged against the statute is that it violates the commerce clause of the Federal Constitution, because it taxes the transfers of certificates of stock in a foreign corporation when made by a non-resident in this State. The commerce clause

provides that Congress shall have power 'to regulate commerce with foreign nations and among the several States and with the Indian tribes.' Art. 1, paragraph 8, Sec. 3. The omission of Congress to exercise this power in any case is an expression of its will that the subject shall be left free from restrictions upon it by the States. Robbins vs. Taxing District, 120 U. S., 489, 30 L. Ed., 694, 1 Inters. Com. Rep., 45, 7 Sup. Ct. Rep., 592. 'Commerce' is the commanding word in the simple but weighty sentence quoted from the Constitution. What is commerce? According to the derivation, history and use of the word, it is the exchange of property, and includes the usual agencies of communication and transportation employed to effect the exchange. Thus, it extends to whatever is used to move the property involved and the persons engaged in making the contract. Interstate commerce, or commerce among the States, means the exchange of property in one State for property in another State. Its essential characteristic is that the property affected must be transported to some point without the State. There must be interstate movement of property. The telegraph cases do not conflict with this view, for the telegraph practically transports either news or money. The interchange may be between residents of different States or residents of the same State, but the property exchanged must move from one State to another. There can be no interstate commerce without interstate transportation of property, which includes money as well as merchandise and whatever can become the subject of exchange.

"Even upon the assumption that certificates of stock are property, the transaction in question involved no movement of property from one State to another, for so far as appears, neither money nor property was brought into the State or taken out of it. A citizen of Connecticut met another citizen of that State in the City of New York and there bought the certificates of him, which were delivered and paid for on the spot. There is no statement in the record that the certificates were brought here to sell or that the money used was brought here to purchase them. As we have seen, the certificates may have been here for years; and this is true of the money also, for it belonged to a broker who carried on business at his office in the city of New York. There was an exchange of certificates for money made in this State, without the transportation of either from another State, as we must presume from the record. This was commerce, but not interstate commerce, because no property moved from one State to another. It was not commerce among States, within the meaning of the Constitution as we read it. The fact hat both actors in the transaction were non-residents has no bearing on the question, for commerce among the States does not depend on the residence of the parties, but on the interchange of property between different States. The exchange in question was made here, the property exchanged was situated here, and, so far as we are advised, nothing was brought into or taken out of the State in order to make the exchange, or as the result of

the exchange as made. The fact that the certificates were issued by foreign corporations, operating railroads in other States, did not involve the movement of property from one State to another, any more than if A grants to B lands in Kansas by a deed given in this State. The stockholder's interest in the foreign corporation could not be brought into the State of New York, and the certificates, which represent that interest, are presumed to have had a taxable situs here.

"The discussion of this point has proceeded thus far on the theory that the tax is in substance a tax on property; but, as we have held, it is in fact a tax on the privilege of transfer. But it is insisted that a tax on the privilege of transferring certificates issued by foreign corporations, when the transfer, though made here, is between non-residents, tends to prevent freedom of commercial intercourse, and hence is a restraint upon interstate commerce. The direct effect of a tax on the privilege of making a contract in this State, to be performed in this State, does not infringe upon interstate commerce, because it does not involve the movement of property between States. Should the indirect effect be regarded as a restraint upon interstate commerce? If so, where is the application of the principle to stop, for, if pushed to its logical conclusion, the States will be prevented from managing their own affairs. The commerce clause was not intended to hamper State legislation, even if the indirect result should remotely affect commerce 'among the several States.' It was not designed to hinder the preservation of order or the procurement of means to that end by the taxation of transfers made within the State, even if they are from one non-resident to another and indirectly touch property without the State. It is the regulation of commerce that is impliedly forbidden, and the regulation of commerce does not include everything distantly connected therewith. Remote and indirect results do not interfere with interstate commerce. A homely illustration will show my meaning: Two boys trade knives. That is commerce in its simplest form. If they live on opposite sides of a State line, and the bargain is made on one side, but delivery on the other, it is interstate commerce. If one of them is flogged for it, that is not interference with interstate commerce, even if it discourages interstate traffic. This example is not used to belittle an important subject, but to illustrate the fact that the indirect effect of State action is not prohibited, unless it discriminates against persons or property from other States, or necessarily has the effect of touching interstate commerce in some substantial way. A tax on the transportation of persons or property between States, or on the business of carrying it on, is direct in its effect and is a tax on commerce; but in a recent case, which held that a cab service maintained by a railroad for the use of interstate passengers is not interstate commerce. It was said: 'Many things have more or less close relation to interstate commerce which are not properly to be regarded

as a part of it. If the cab which carries the passengers from the hotel to the ferry landing is engaged in interstate transportation, why is not the porter who carries the traveler's trunk from his room to the carriage also so engaged? If the cab service is interstate transportation, are the drivers of the cabs and the dealers who supply hay and grain for the horses also engaged in interstate commerce? And where will the limit be placed?' New York ex rel. Pennsylvania Railroad Co. vs. Knight, 192 U. S., 21, 48 L. Ed., 325, 24 Supreme Court Reports, 202, affirming 179 N. Y., 354, 98 Am. St. Rep., 610, 64 N. E. Rep., 152.

"While interstate commerce, as such, can not be taxed at all, the property employed therein may be taxed, even if it is used to facilitate interstate traffic, such as the rolling stock of a foreign railroad corporation running cars into one State from another. Pullman Palace Car Co. vs. Pennsylvania, 141 U. S., 18, 35 L. Ed., 613, 3 Interstate Com. Rep., 595, 11 Supreme Court Reports, 876. In deciding this case, the court said: 'There is nothing in the Constitution or laws of the United States which prevents a State from taxing personal property, employed in interstate or foreign commerce like other personal property within its jurisdiction. Citing Delaware Railroad Tax, 18 Wall., 206, 232, 21 L. Ed., 888, 896; Western Union Telegraph Co. vs. Texas, 105 U. S., 460, 464, 26 L. Ed., 1067, 1068; Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 196, 206, 211, 29 L. Ed., 158, 163, 164; 1 Interstate Commerce Reports, 382, 5 Supreme Court Reports, 826; Western Union Telegraph Co. vs. Attorney General, 125 U. S., 530, 549, 31 L. Ed., 790, 793, 8 Supreme Court Reports, 961; Mary vs. Baltimore & O. Ry. Co., 127 U. S., 117, 124, 32 L. Ed., 94, 96, 8 Supreme Court Reports, 1037; Leloup vs. Mobile, 127 U. S., 640, 649, 32 L. Ed., 311, 314, 2 Interstate Commerce Reports, 134, 8 Supreme Court Reports, 1380.' A railroad company engaged in interstate commerce, and operating a railroad lying partly within and partly without a State, 'is liable to pay an excise tax according to the value of the business done in the State.' Maine vs. Grand Trunk Ry. Co., 142 U. S., 217, 35 L. Ed., 994, 3 Interstate Commerce Reports, 807, 12 Supreme Court Reports, 121, 163. A State can not regulate interstate commerce, for Congress only has the power; but, as it can tax property employed therein the same as all other property, it can tax the privilege of transferring such property, provided it treats non-residents the same as residents, and subjects all transfers in the same class to the same tax. If there is no discrimination in favor of domestic commerce, there is no attack on interstate commerce, for the indirect effect of such a tax is no greater than one laid on property used therein. Taxation of a telegraph company doing an interstate business, upon its property within the State, is valid; but a statute authorizing an injunction to restrain the company from transacting business until an overdue tax is paid is invalid, because it interferes with an act of Congress relating to post roads.

The tax did not interfere, as the result was indirect; but the injunction did, because it was direct in its effect. Western Union Telegraph Co. vs. Attorney General, 125 U. S., 530; 31 L. Ed., 790; 8 Supreme Court Reports, 961.

"A tax on the right to engage in interstate commerce, as by a commercial traveler, was held void as an attempt to regulate a subject under Federal control; but that is quite different in principle from a tax on all transfers of a certain kind of property, which, like all other property, may at times enter into interstate transactions, but is not peculiar thereto. Robbins vs. Taxing District, 120 U. S., 489, 30 L. Ed., 694, 1 Interstate Commerce Reports, 45, 7 Supreme Court Reports, 592. The tax before us is not on the transfer of stock in foreign corporations, but on the transfer of stock in all corporations. A uniform tax imposed by a State on all sales made in it, whether they be made by a citizen of it or a citizen of some other State, and whether the goods sold are the produce of the State enacting the law or of some other State, is valid, because 'there is no attempt to discriminate injuriously gainst the products of other States or the rights of their citizens, and the case is not, therefore, an attempt to fetter commerce among the States, or to deprive the citizens of other States of any privilege or immunity possessed by the citizens of' the State in question. Woodruff vs. Parham, 8 Wall., 123, 140, 19 L. Ed., 382, 387; Brown vs. Houston, 140 U. S., 622, 29 L. Ed., 257, 5 Sup. Ct. Rep., 1091; Emert vs. Missouri, 156 U. S., 297, 39 L. Ed., 431, 15 Sup. Ct. Rep., 367; American Steel Wire Co. vs. Speed, 192 U. S., 500, 48 L. Ed., 538, 24 Sup. Ct. Rep., 365. So a tax on all meat packing houses in a State, or on the agents thereof, is valid, although some do an interstate as well as a domestic business. Armour Packing Co. vs. Lacy, 200 U. S., 232, 50 L. Ed., 451, 26 Sup. Ct. Rep., 232; Kehrer vs. Stewart, 197 U. S., 60; 49 L. Ed., 663, 25 Sup. Ct. Rep., 403. A tax on the gross commissions of brokers derived, wholly in one instance and partly in another, from sales made in behalf of many non-resident principals who shipped goods from without the State for sale, was held to affect interstate commerce only so 'incidently and remotely as not to amount to a regulation thereof.' Ficklen vs. Taxing District, 145 U. S., 1, 36 L. Ed., 601, 4 Inters. Com. Rep., 79, 12 Sup. Ct. Rep., 810. Where the business of the brokers was not general, with the rights to engage in all kinds, but was in terms limited to specific non-resident principals, the effect was held to be direct and the tax void. Stockard vs. Morgan, 185 U. S., 27, 37, 46 L. Ed., 785, 794, 22 Sup. Ct. Rep., 576. The cases distinguish, carefully and critically, between direct and remote results, and with reason, for the Constitution is not sensitive to clouds on the horizon, but to clouds overhead. In the nature of things, every slight and incidental consequent of State action does not constitute State regulation, for this would lead to sad confusion and leave the subject in perpetual doubt. Attention should be paid to the interests of the State as well as

those of the nation and a construction just to both should be adopted. The legislative power of the State should not be shackled, and the commerce clause of the Constitution should not be frittered away by extreme views in either direction. Immaterial, indirect and remote effects should be ignored and substantial results alone considered. As Mr. Justice Peckham recently said: 'The effect upon the commerce spoken of must be direct and proximate. New York L. E. & W. R. Co. vs. Penn., 158 U. S., 431, 439, 39 L. Ed., 1043, 1046, 15 Sup. Ct. Rep., 896. An agreement may, in a variety of ways, affect interstate commerce just as State legislation may, and yet, like it, be entirely valid, because the interference produced by the agreement or by the legislation is not direct.' Hopkins vs. U. S., 171 U. S., 578, 594, 43 L. Ed., 290, 296, 19 Sup. Ct. Rep., 40, citing Sherlock vs. Alling, 93 U. S., 99, 103 L. Ed., 819, 820; United States vs. E. C. Knight Co., 156 U. S., 1, 16, 39 L. Ed., 325, 330, 15 Sup. Ct. Rep., 249; Pittsburgh & S. Coal Co. vs. Louisiana, 156 U. S., 590, 597, 39 L. Ed., 544, 547, 5 Inters. Com. Rep., 18, 15 Sup. Ct. Rep., 459; Parkersburg & Ohio River Transp. Co. vs. Parkersburg, 107 U. S., 691, 27 L. Ed., 584, 2 Sup. Ct. Rep., 732; Ficklen vs. Taxing District, supra.

"The principles governing interstate commerce are in process of development, and, as is usually true in evolving the law out of many complicated cases, the treatment by the courts has not always been uniform or consistent. We think, however, that the weight of authority regards State legislation which treats all persons, all property and all transfers of the same class in the same way, under the same circumstances and which does not directly or materially touch interstate commerce, as not amounting to State regulation. While restraint by the State is regulation by the State, it must be direct or substantial to have that effect; and the statute under consideration falls under neither head. The question is, not whether the statute is wise, but whether it is valid; and we think it is valid."

The above case was affirmed by this court in an opinion by Mr. Justice Holmes, which leaves but little to be said upon the question. (204 U. S., 160-162). That opinion contains the following:

"The other ground of attack is that the act is an interference with commerce among the several States. Cases were imagined, which, it was said, would fall within the statute, and yet would be cases of such commerce; and it was argued that if the act embraced any such cases it was void as to them, and, if void as to them, void altogether, on a principle often stated. United States vs. JuToy, 198 U. S., 253, 262. That the act is void as to transactions in commerce between the States, if it applies to them, is thought to be shown by the decisions concerning ordinances requiring a license fee from drummers, so called, and the like. Robbins vs. Shelby County Taxing District, 120 U. S., 489; Stockard vs. Morgan, 185 U. S., 27; Rearick vs. Pennsylvania, 203 U. S., 507.

"But there is a point beyond which this court does not consider arguments of this sort for the purpose of invalidating the tax laws of a State on constitutional grounds. This limit has been fixed in many cases. It is that unless the party setting up the unconstitutionality of the State law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected, this court does not listen to his objections, and will not go into imaginary cases, notwithstanding the seeming logic of the position that it must do so, because if for any reason, or as against any class embraced, the law is unconstitutional, it is void as to all. Supervisors vs. Stanley, 105 U. S., 305, 311; Clark vs. Kansas City, 176 U. S., 114, 118; Lampasas vs. Bell, 180 U. S., 276, 283, 284; Cronin vs. Adams, 192 U. S., 108, 114. If the law is valid when confined to the class of the party before the court, it may be more or less of a speculation to inquire what exceptions the State court may read into general words, or how far it may sustain an act that partially fails. With regard to taxes, especially, perhaps it might be assumed that the Legislature meant them to be valid to whatever extent they could be sustained, or some other peculiar principle might be applied. See e. g. People's National Bank vs. Marye, 191 U. S., 272, 283.

"Whatever the reason, the decisions are clear, and it was because of them that it was inquired so carefully in the drummer cases whether the party concerned was himself engaged in commerce between the States. Stockard vs. Morgan, 185 U. S., 27, 30, 35, 36; Caldwell vs. North Carolina, 187 U. S., 622; Rearick vs. Pennslyvania, 203 U. S., 507. Therefore, we begin with the same inquiry in this case, and it is plain that we can get no farther. There is not a shadow of a ground for calling the transaction described such commerce. The communication between the parties were not between different States, as in Western Union Telegraph Co. vs. Texas, 105 U. S., 460, and the bargain did not contemplate or induce the transport of property from one State to another, as in the drummer cases. Rearick vs. Pennsylvania, *supra*. The bargain was not affected in any way, legally or practically, by the fact that the parties happened to have come from another State before they made it. It does not appear that the petitioner came into New York to sell his stock, as was put on his behalf. It appears only that he sold after coming into the State. But we are far from implying that it would have made any difference if he had come to New York with the supposed intent before any bargain was made.

"It is said that the property sold was not within the State. The immediate object of sale was the certificate of stock present in New York. That document was more than evidence; it was a constituent of title. No doubt, in a more remote sense, the object was the membership or share which the certificate conferred or made attainable. More remotely still it was an interest in the property of the corporation, which might be in other States than

either the corporation or the certificate of stock. But we perceive no relevancy in the analysis. The facts that the property sold is outside of the State, and the seller and buyer foreigners, are not enough to make a sale commerce with foreign nations or among the several States, and that is all there is here. On the general question there should be compared with the drummer cases the decisions on the other side of the line. Nathan vs. Louisiana, 8 How., 73; Woodruff vs. Parham, 8 Wall., 123; Brown vs. Houston, 114 U. S., 622; Emert vs. Missouri, 156 U. S., 296. A tax is not an unconstitutional regulation in every case where an absolute prohibition of sales would be one. American Steel & Wire Co. vs. Speed, 192 U. S., 500. We think it unnecessary to explain at greater length the reasons for our opinion that the petitioner has suffered no unconstitutional wrong."

In the case of Texas Company vs. Stephens, 100 Texas, 640, the contention was made that plaintiff's business, in so far as it consisted of sales and deliveries out of the State, was not within the taxing power of the Legislature. The court answered this contention by saying that the occupation taxed was carried on wholly within the State, and that occupation was the subject of the tax; that particular sales were not taxed, the volume of business being consulted merely to determine the amount of taxes upon the occupation. We think that there can be no doubt that the Supreme Court of Texas took the correct view of the question and the one in harmony with the decisions of this court.

In the case of Swift & Company vs. United States, 196 U. S., 378, it is held that the fact that a sale is made with a view to the goods being transported by the buyer to another State after the sale and delivery is complete does not make the sale interstate commerce.

Not a single transaction involved in this case can possibly be construed to constitute interstate commerce. Not a single sale is shown to have been made in the State for delivery outside of it, and even if it could be so shown, plaintiff in error would not be entitled to relief for the taxes involved here is an occupation tax pure and simple.

In the case of Ficklen vs. Shelby County, 145 U. S., 21, this court uses the following language:

"No doubt can be entertained of the right of a State Legislature to tax trades, professions and occupations, in the absence of inhibition in the State Constitution in that regard; and where a resident citizen engages in general business subject to a particular tax the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resi-

dent and non-resident merchants, of goods situated in another State, does not necessarily involve the taxation of interstate commerce, forbidden by the Constitution."

Here the tax is imposed upon those engaged in the wholesale business of oil and its products. The amount of the tax is upon the basis of oil sold, and oil received, possessed and handled, which we submit is a fair method of determining the extent to which the privilege of carrying on the occupation is enjoyed.

We respectfully ask that the judgment of the court below be affirmed.

Respectfully submitted,

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